

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1929

No. 4914.

652

NEIMAN-MARCUS COMPANY, APPELLANT,

Robert H. Lucas,

vs.

1 COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED JANUARY 31, 1929.

PRINTED MARCH 20, 1929.

Court of Appeals of the District of Columbia

JANUARY TERM, 1929

No. 4914.

NEIMAN-MARCUS COMPANY, APPELLANT,

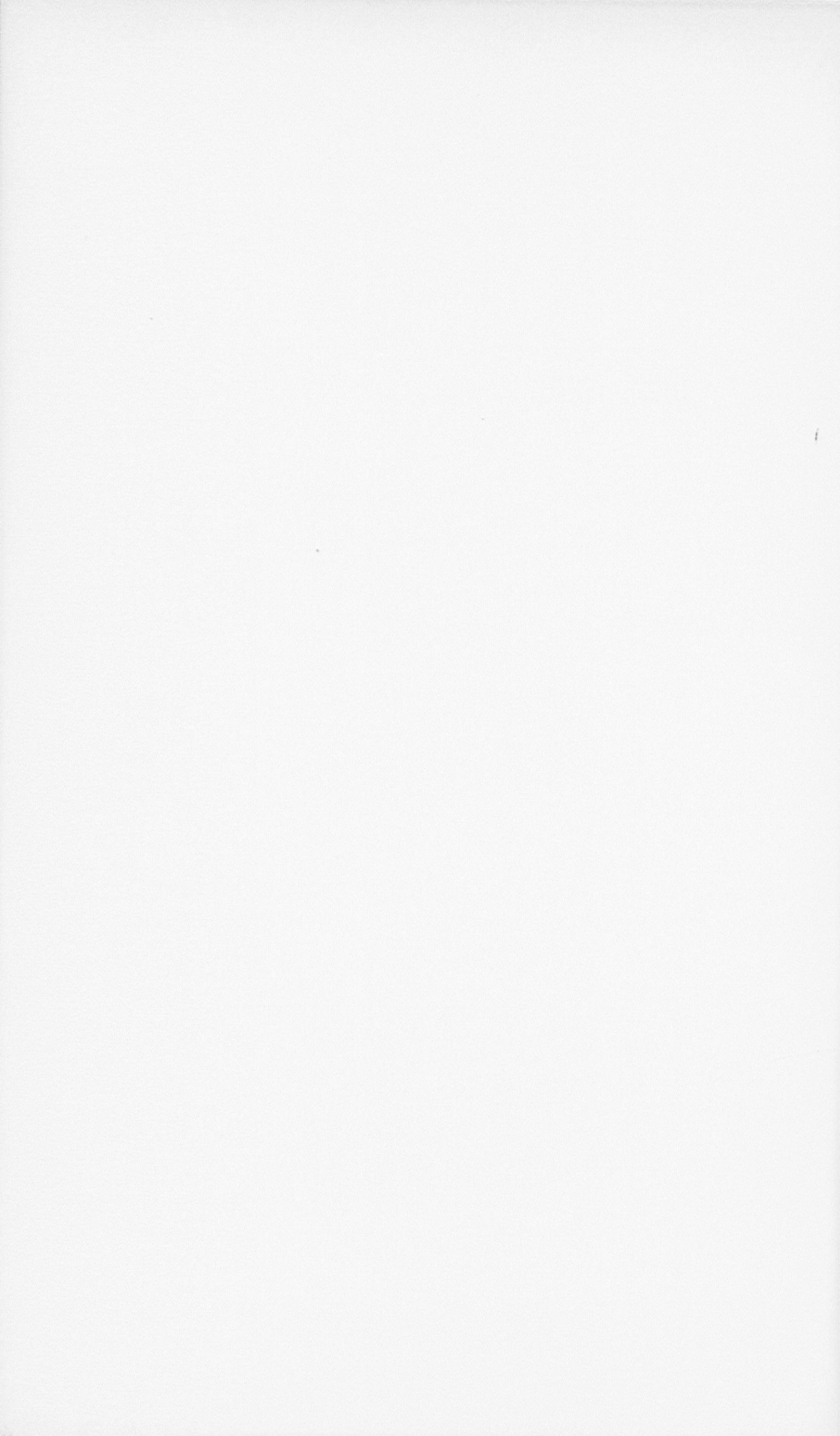
vs.

COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 4914.

NEIMAN-MARCUS COMPANY, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE.

1

Docket 11273.

NEIMAN-MARCUS COMPANY, Main & Ervay Sts., Dallas,
Texas, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

For the taxpayer: B. G. Simpich, Esq., Donald Horne,
Esq.

For the Comm'r: J. L. Backstrom, Esq., C. T. Brown,
Esq.

Docket Entries.

1926.

- Jan. 25. Petition received & filed.
“ 28. Copy of petition served on Solicitor.
“ 28. Notification of receipt mailed taxpayer.
Mar. 27. Answer filed by Solicitor.
“ 31. Copy of answer served on taxpayer. Assigned
to General Calendar.
May 5. Verified petition filed by taxpayer.
“ 8. Granted leave to file. Both sides notified.
“ 10. Copy of amended petition served on Solicitor.
Taxpayer notified.
“ 27. Stipulation filed re: answer to petition standing
as answer to verified petition.

1927.

- Sept. 29. Hearing date set 12-1-27.

- Dec. 1. Hearing had before Mr. Morris on merits. Case submitted. Taxpayer's brief due 12-31-27. Comr's brief due 1-28-28. Taxpayer's brief to be served on Comm'r when filed.
- " 13. Transcript of hearing 12-1-27 filed.
- " 29. Brief filed by taxpayer. Copy served on G. C. 12-30-27.
- 1928.
- Jan. 27. Motion for an extension to 2-27-28 to file brief filed by G. C.
- " 30. Motion granted to 2-27-28.
- May 4. Findings of fact & opinion rendered (Mr. Morris). Judgment will be entered for the respondent.
- " 7. Order of redetermination entered.
- Aug. 13. Motion to fix amount of bond filed by taxpayer.
- " 13. Order fixing amount of bond at \$18,830.58 entered.
- Sept. 28. Stipulation of venue filed. Court of Appeals of D. C.
- " 28. Petition for review by Ct. of Appeals, D. C. with assignments of error filed by taxpayer.
- Oct. 13. Præcipe filed by taxpayer.
- " 15. Order denying petitioner's request that Board approve Bond & Surety in connection with petition for review entered.
- " 17. Opinion rendered (Mr. Littleton).
- " 23. Proof of service of petition filed.
- Nov. 26. Motion for a 20 day extension to transmit record filed by taxpayer.
- " 27. Order enlarging time to 12-31-28 to prepare evidence & deliver record entered.
- Dec. 4. Motion & objections to præcipe filed by G. C.
- " 4. Supplemental præcipe filed by G. C.

- Dec. 13. Motion acquiescing in respondent's objections & substituting new statement of evidence filed by taxpayer.
- " 20. Objections to statement of evidence filed by G. C.
- " 27. Motion for extension of 30 days to file record filed by taxpayer.

Dec. 28. Notice of hearing on Jan. 8, 1929 to present statement of evidence filed by taxpayer.

“ 28. Order enlarging time to 1-30-29 to prepare evidence & transmit record entered.

1929.

Jan. 8. Transcript of hearing 1-8-29 filed.

“ 8. Hearing had before Mr. Morris on motion to approve statement of evidence C. A. V. Statement of evidence filed at hearing.

“ 8. Statement of evidence approved & ordered filed.

“ 9. Order granting respondent's motion of 12-4-28 & præcipe amended in accordance therewith, entered.

“ 30. Order enlarging time to 2-15-29 to file transcript of record entered.

Now, January 16, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

3 Filed Jan. 25, 1926, U. S. Board of Tax Appeals

United States Board of Tax Appeals.

Docket No. 11273.

Appeal of NEIMAN-MARCUS COMPANY, Main and Ervay Streets, Dallas, Texas.

Year: 1918.

Petition.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:SM-60D/DLP-A-11858, dated November 27th, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a corporation organized under the laws of the State of Texas, with its principal place of business at Main and Ervay Streets, Dallas, Texas.

4 2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer on November 27th, 1925.

3. The taxes in controversy are income and profits taxes for the calendar year 1918 and are less than \$10,000, to-wit: \$9,415.29.

4. The determination of tax contained in said deficiency letter is based upon the following errors:

(a) That taxpayer's application for assessment under Section 327 and 328 of the Revenue Act of 1918 was denied.

(b) The Commissioner erred in reducing taxpayer's invested capital by taxpayer's Federal income and excess profits taxes for 1917 prorated.

(c) The time within which the alleged deficiency may be assessed has elapsed.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

(a) That the taxpayer's capital and income for 1918 were affected by abnormal conditions which worked upon it an exceptional hardship as evidenced by its abnormally high excess profits tax; that none of its income was derived from Government contracts on a cost-plus basis; that said tax was high not merely because taxpayer earned a high rate of profit upon a normal invested capital, but because of abnormal conditions affecting its capital and income; these abnormal conditions were, in general: (1) unusually low officers' salaries, (2) ability to borrow large sums due to the personal credit of its officers, thus enabling taxpayer to do a large volume of business with a very small statutory invested capital, (3) the possession of good will of great value, none of which it can include in invested capital, because it has not purchased it, but has built it up from the time of its organization, whereas usually taxpayers have purchased goodwill from predecessor corporations and are allowed to include the value of goodwill in invested capital; that taxpayer pursuant to the provisions

5 of Section 327 of the Revenue Act of 1918, duly made application to the Commissioner of Internal Revenue for assessment under the provisions of Section 328 of said Act, but the Commissioner of Internal Revenue denied said application; taxpayer further represents, upon information and belief, that the Commissioner of In-

ternal Revenue did not compare the excess-profits tax of taxpayer with the average excess-profits tax of representative corporations, as required by Section 327 of the Revenue Act of 1918.

(b) In computing 1918 invested capital, the Commissioner deducted from such invested capital 200/365 of taxpayer's Federal income and excess-profits taxes as finally determined, subsequent to 1918, for the calendar year 1917.

(c) Taxpayer's income and excess profits tax return for the calendar year 1918 was filed with the Collector of Internal Revenue more than five years before November 27, 1925, the date of the deficiency letter.

6. The taxpayer in support of its appeal relies upon the following propositions of law:

(a) Corporations whose capital or income is affected by abnormal conditions should be assessed under Section 328 of the Revenue Act of 1918 for the year 1918.

The comparison provided for by Section 327 of said Act should be made with all representative corporations in the same line of business not subject to the same abnormal conditions as taxpayer, or other abnormal conditions.

(b) Invested capital should not be reduced by taxes for the prior years prorated.

6 (c) The Commissioner is authorized by Congress to assess income and profits taxes for 1918 at any time within five years from the time the return was filed, but not thereafter.

Wherefore the taxpayer respectfully prays that this Board may hear and determine its appeal.

DONALD HORNE,
Counsel for Taxpayer, 120 Broadway,
New York, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Donald Horne, being first duly sworn, deposes and says that he is counsel for the taxpayer in the above-entitled appeal, and makes this verification because said taxpayer and its officers are absent from the city where he has his office, and affiant is unable to obtain a verification of this petition in time to file it before the time within which this appeal may be taken expires; that affiant is familiar with

the facts involved in this appeal; that he has read the foregoing petition, and knows the contents thereof, and that the same is true except as the facts therein stated on information and belief, and as to those facts that he believes it to be true.

DONALD HORNE.

Sworn to before me this 23rd day of January, 1926.

[Seal of Julia I. Banks, Commissioner of Deeds, City of New York.]

JULIA I. BANKS,
Commissioner of Deeds, City of New York.

New York County Clerk's No. 134.
Term expires April 8th, 1926.

7 Copy.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:E:SM-60D.
DLP-A-11858.

Nov. 27, 1925.

Neiman-Marcus Company,
Main and Ervay Streets,
Dallas, Texas.

SIRS:

An audit of your income and profits tax return for the taxable year 1918 has resulted in the determination of a deficiency in tax of \$9,415.29, as shown in Bureau letter dated July 15, 1924.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so

within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D/DLP-A-11858. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner,

By ————,
Assistant to the Commissioner.

8

Copy.

Statement.

IT:E:SM-60D. DLP-A-11858.

In re NEIMAN-MARCUS COMPANY, Main and Ervay Streets,
Dallas, Texas.

Deficiency in Tax: \$9,415.29.

Reference is made to your protest dated August 8, 1924 and to conference held October 19, 1925.

You are advised that after a thorough review of your case, the Bureau holds that no exceptional hardship evidenced by a gross disproportion between the tax computed without the benefit of Section 327 and the tax computed with reference to representative corporations specified under Section 328 owing to abnormal conditions affecting your capital or income, has been disclosed.

The conclusions set forth in Bureau letter to you dated July 15, 1924 are, therefore, sustained.

A copy of this letter has been furnished your duly authorized representative, Mr. J. Austin Smith, Munsey Building, Washington, D. C.

spf-6.

Now, January 16, 1929, the foregoing petition certified from the record as a true copy.

[Seal Board of Tax Appeals 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

9 Filed Mar. 27, 1926, United States Board of Tax Appeals

United States Board of Tax Appeals.

Docket #11273.

Appeal of NEIMAN-MARCUS COMPANY, Dallas, Texas.

Answer.

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits, alleges and denies as follows:

(1) Admits the allegations in paragraphs 1, 2 and 3 of taxpayer's petition.

(2) Denies that the Commissioner erred in disallowing this taxpayer's application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

(3) Denies that the Commissioner erred in reducing this taxpayer's invested capital for the year 1918 in an amount equal to this taxpayer's Federal income and excess profits taxes for the calendar year 1917, prorated according to the due date thereof in the year 1918.

(4) Denies that the time within which the deficiency may be assessed has elapsed.

(5) Alleges that both the Commissioner and this taxpayer have consented in writing to the assessment, at any time during the period expiring December 31, 1926, but extended in the event an appeal is filed with the Board of Tax Appeals by the number of days between the mailing of the deficiency letter and the date of the final decision of the Board.

(6) Alleges that the invested capital of this taxpayer for the calendar year 1918 has been computed in accordance

with the provisions of article 845 of Regulations 45, in force during the year 1919 when this taxpayer's return for the calendar year 1918 was due.

10 (7) Denies the material allegations of fact contained in Paragraph 5 of the taxpayer's petition.

(8) Denies generally and specifically each and every allegation in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Propositions of Law.

1. Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 of the Revenue Act of 1926 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon.

2. This taxpayer is not entitled to a determination of its profits tax in accordance with the provisions of Section 328 of the Revenue Act of 1918.

3. This taxpayer's invested capital for the year 1918 has been properly computed in accordance with the provisions of Article 845 as validated by Section 1207 of the Revenue Act of 1926.

Wherefore it is prayed that this taxpayer's appeal be denied.

A. W. GREGG,

Solicitor of Internal Revenue,

Attorney for the Commissioner of Internal Revenue.

Of counsel:

THOMAS M. WILKINS,

Special Attorney, Bureau of Internal Revenue.

Now, January 16, 1929, the foregoing answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

11 Filed May 5, 1926, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11273.

Appeal of NEIMAN-MARCUS COMPANY, Main and Ervay
Streets, Dallas, Texas.

Year: 1918.

Verified Petition.

Leave to file granted May 8, 1926.

(Signed) G. G. KORNER, JR.,
Member U. S. Board of Tax Appeals.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:SM-60D/DLP-A-11858, dated November 27th, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a corporation organized under the laws of the State of Texas, with its principal place of business at Main and Ervay Streets, Dallas, Texas.

2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer on November 27, 1925.

12 3. The taxes in controversy are income and profits taxes for the calendar year 1918 and are less than \$10,000, to-wit: \$9,415.29.

4. The determination of tax contained in said deficiency letter is based upon the following errors:

(a) That taxpayer's application for assessment under Sections 327 and 328 of the Revenue Act of 1918 was denied.

(b) The Commissioner erred in reducing taxpayer's invested capital by taxpayer's Federal income and excess profits taxes for 1917 prorated.

(c) The time within which the alleged deficiency may be assessed has elapsed.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

(a) That the taxpayer's capital and income for 1918 were affected by abnormal conditions which worked upon it

an exceptional hardship as evidenced by its abnormally high excess profits tax; that none of its income was derived from Government contracts on a cost-plus basis; that said tax was high not merely because taxpayer earned a high rate of profit upon a normal invested capital, but because of abnormal conditions affecting its capital and income; these abnormal conditions were, in general: (1) unusually low officers' salaries, (2) ability to borrow large sums to the personal credit of its officers, thus enabling taxpayer to do a large volume of business with a very small statutory invested capital, (3) the possession of good will of great value, none of which it can include in invested capital, because it has not purchased it, but has built it up from the time of its organization, whereas usually taxpayers have purchased goodwill from predecessor corporations and are allowed to include the value of goodwill in invested capital; that taxpayer pursuant to the provisions of

13 Section 327 of the Revenue Act of 1918, duly made application to the Commissioner of Internal Revenue for assessment under the provisions of Section 328 of said Act, but the Commissioner of Internal Revenue denied said application; taxpayer further represents upon information and belief, that the Commissioner of Internal Revenue did not compare the excess-profits tax of taxpayer with the average excess-profits tax of representative corporations, as required by Section 327 of the Revenue Act of 1918.

(b) In computing 1918 invested capital, the Commissioner deducted from each invested capital 200/365 of taxpayer's Federal income and excess-profits taxes as finally determined, subsequent to 1918, for the calendar year 1917.

(c) Taxpayer's income and excess profits tax return for the calendar year 1918 was filed with the Collector of Internal Revenue more than five years before November 27, 1925, the date of the deficiency letter.

6. The taxpayer in support of its appeal relies upon the following propositions of law:

(a) Corporations whose capital or income is affected by abnormal conditions should be assessed under Section 328 of the Revenue Act of 1918 for the year 1918.

The comparison provided for by Section 327 of said Act should be made with all representative corporations in the same line of business not subject to the same abnormal conditions as taxpayer, or other abnormal conditions.

(b) Invested capital should not be reduced by taxes for the prior years prorated.

14 (c) The Commissioner is authorized by Congress to assess income and profits taxes for 1918 at any time within five years from the time the return was filed, but not thereafter.

Wherefore the taxpayer respectfully prays that this Board may hear and determine its appeal.

DONALD HORNE,
Counsel for Taxpayer,
120 Broadway, New York, N. Y.

STATE OF TEXAS,
County of —, ss:

Herbert Marcus, being first duly sworn, deposes and says that he is president of the Nieman-Marcus Company, the taxpayer named in the foregoing petition, and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

HERBERT MARCUS.

Sworn to before me this 19th day of April, 1926.

[Seal of Notary Public, County of Dallas, Texas.]

O. C. LUND,
Notary Public.

15 Copy.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:E:SM-60D. DLP-A-11858.

Nov. 27, 1925.

Neiman-Marcus Company,
Main and Ervay Streets,
Dallas, Texas.

SIRS:

An audit of your income and profits tax return for the taxable year 1918 has resulted in the determination of a

deficiency in tax of \$9,415.29, as shown in Bureau letter dated July 15, 1924.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D/DL P-A11858. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By ————,
Assistant to the Commissioner.

16

Copy.

Statement.

IT:E:SM-60D. DLP-A-11858.

In re NEIMAN-MARCUS COMPANY, Main and Ervay Streets,
Dallas, Texas.

Deficiency in Tax, \$9,415.29.

Reference is made to your protest dated August 8, 1924, and to conference held October 19, 1925.

You are advised that after a thorough review of your case, the Bureau holds that no exceptional hardship evidenced by a gross disproportion between the tax computed without the benefit of Section 327 and the tax computed with reference to representative corporations specified under Section 328 owing to abnormal conditions affecting your capital or income, has been disclosed.

The conclusions set forth in Bureau letter to you dated July 15, 1924 are, therefore, sustained.

A copy of this letter has been furnished your duly authorized representative, Mr. J. Austin Smith, Munsey Building, Washington.

spf-6.

Now, January 16, 1929, the foregoing verified petition certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

17 Filed May 27, 1926, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11273.

Appeal of NEIMAN-MARCUS COMPANY, Main and Ervay
Streets, Dallas, Texas.

Year: 1918.

Stipulation.

Whereas taxpayer has filed its second petition herein and whereas said petition contains no change from the original petition filed except that it is verified by taxpayer instead of by counsel,

It is hereby stipulated that the answer of the Commissioner of Internal Revenue to the original petition, heretofore filed, may be considered and treated as his answer to said second petition.

DONALD HORNE,
Counsel for Taxpayer.

(Signed) A. W. GREEN,
Counsel for Commissioner of Internal Revenue.

Now, January 16, 1929, the foregoing stipulation certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

18 A true copy. Teste:

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated May 4, 1928.

The assessment of the deficiency herein is not barred by the statute of limitations.

B. G. Simpich, Esq., and Donald Horne, Esq., for the petitioner.

G. L. Backstrom, Esq., for the respondent.

This is a proceeding for the redetermination of a deficiency in income and profits taxes for the calendar year 1918 amounting to \$9,415.29.

While three issues were raised by the pleadings, two of them were withdrawn by counsel for the petitioner at the hearing of this proceeding, which leaves for our consideration the sole question of whether assessment of the deficiency herein is barred by the statute of limitations.

Findings of Fact.

The petitioner is a corporation organized and incorporated under the laws of the State of Texas with its principal place of business in Dallas.

Petitioner prepared and duly filed an income and profits tax return for the year 1918 on June 15, 1919. Under date of February 8, 1924, the petitioner and the respondent entered into the following written consent to extend the time prescribed by law for assessment and collection of its income and profits taxes due under its return for 1918:

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Neiman Marcus Company, of Dallas, Texas, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said taxpayer for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes,' approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

Under date of April 20, 1925, the petitioner and respondent entered into another consent in writing to extend the time prescribed by law for assessing its income and profits taxes due under its return for 1918, which reads as follows:

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Company, a taxpayer of Main & Ervay Streets, Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to

said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

20 Under date of October 23, 1925, the petitioner and respondent entered into a further consent in writing to extend the time prescribed by law for making the assessment of income and profits taxes due under its return for 1918, which reads as follows:

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Company, a taxpayer of Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

The respondent mailed a deficiency notice to the petitioner on November 27, 1925, showing therein a deficiency of \$9,415.29, and the petitioner filed a petition with this Board, appealing from the findings set forth in said deficiency letter, on January 25, 1926.

Opinion.

MORRIS: The sole question for our consideration is whether the assessment of the deficiency asserted by the respondent is barred by the statute of limitations.

The petitioner contends that its case is one falling within the provisions of section 283 (b) of the Revenue Act of 1926, and that, therefore, the deficiency must be regarded as one imposed by that Act and, furthermore, that the procedure with respect to the assessment and collection of said deficiency as provided for in section 274 of that Act must be followed. Section 274 (a) of the Revenue Act of 1926 provides:

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. * * *

The petitioner's counsel argues that since the respondent failed to mail a notice of deficiency to it after the enactment of the Act of 1926, the following provision of section 274 (a), *supra*, is controlling.

* * *, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer. * * *

While section 283 (a) of the Revenue Act of 1926 provides that if after the enactment thereof the respondent determines that an assessment should be made in respect to the Revenue Acts of 1916, 1917, 1918, 1921 and 1924, he is *authorized* to mail a notice of the amount proposed to be assessed, there is no mandatory provision that the respondent should mail such a notice where the determination has been made and notice has already been mailed prior to the enactment of the 1926 Act. The fact that section 283 (b) of that act specifically gives the Board jurisdiction of an appeal filed from such a notice and pending before the Board at the time of the enactment of that act refutes the petitioner's contention. We, therefore, are unable to concur in it.

22 The petitioner's income and profits tax return for the year 1918 was filed on June 15, 1919; under date of February 8, 1924, or within five years after the filing of its 1918 return, the petitioner and respondent entered

into a written consent to extend the time within which the assessment of tax for that year might be made for a period of one year; on April 20, 1925 the petitioner and respondent entered into another consent in writing to extend the time prescribed by law for the assessment of taxes for 1918, until December 31, 1925, and on October 23, 1925, a further consent in writing was entered into between the petitioner and respondent extending the time for making said assessment for 1918 until December 31, 1926, "except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board." The respondent mailed a deficiency notice to the petitioner on November 27, 1925, and the petitioner duly appealed therefrom to this Board on January 25, 1926.

The Revenue Act of 1924, sections 277 and 278, provide:

Sec. 277 (a). Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279.

* * * * *

(2) The amount of income, excess-profits and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

Sec. 278 (c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

Sec. 277 (b). The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

Similar provisions appear in the Revenue Act of 1926.

The petitioner and the respondent having consented in writing to extend the period within which assessment of the tax for 1918 might be made as provided for in section 278 (c) supra, and a notice of deficiency having been mailed to the petitioner by the respondent, within said period as extended, in accordance with section 274 of the Revenue Act of 1924, and the petitioner having filed an appeal with this Board within the time prescribed, the assessment of the tax is not barred by the statute of limitations.

24 We have examined the case of Toxaway Mills, Inc., 61 Court of Claims 363, and 63 Court of Claims 646, but are unable to agree with counsel for the petitioner that the instant case falls within the doctrine laid down therein. Judgment will be entered for the respondent.

Now, January 16, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

25 United States Board of Tax Appeals, Washington.
Docket No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order of Redetermination.

Pursuant to the Board's findings of fact and opinion, promulgated May 4, 1928, it is

Ordered and decided that upon redetermination, there is deficiency for the year 1918 in the amount of \$9,415.29.

Enter.

(Signed)

LOGAN MORRIS,

Member United States Board of Tax Appeals.

Dated Washington, D. C., — — —.

Now, January 16, 1929, the foregoing order of redetermination certified from the record as a true copy.

Entered May 7, 1928.

[Seal U. S. Board of Tax Appeals 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

A true Copy. Teste.

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

26 Filed Sept. 23, 1928, U. S. Board of Tax Appeals.

Court of Appeals of the District of Columbia

Docket No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition for Review.

To the Honorable the Chief Justice and Associate Justices
of the Court of Appeals of the District of Columbia:

Your petitioner is aggrieved by a decision of the United States Board of Tax Appeals rendered against it on May 7, 1928, in the case of Neiman-Marcus Company v. Commissioner of Internal Revenue, No. 11,273 on the Docket of the Board, and respectfully submits his petition for a review thereof by the Court of Appeals of the District of Columbia, the parties having agreed that the review shall be in this Court, as evidenced by stipulation filed with the Clerk of the Board.

Statement of the Case.

1. The petitioner is, and at all times material to this controversy was a corporation organized and existing under and by virtue of the laws of the State of Texas, with its principal place of business at Main and Ervay
27 Streets, Dallas, Texas.

2. On November 27, 1925, respondent mailed to petitioner, by registered mail, a notice of deficiency in words and figures as follows:

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:E:SM-60D.

DLP-A-11858.

Nov. 27, 1925.

Neiman-Marcus Company,
Main and Ervay Street,
Dallas, Texas.

SIRS:

An audit of your income and profits tax return for the taxable year 1918 has resulted in the determination of a deficiency in tax of \$9,415.29, as shown in Bureau letter dated July 15, 1924.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60d/DLP-A-11858. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner,

By ————,
Assistant to the Commissioner.

Statement.

IT:E:SM-60D. DLP-A-11858.

IN re NEIMAN-MARCUS COMPANY, Main and Ervay Streets,
Dallas, Texas.

Deficiency in Tax: \$9,415.29.

Reference is made to your protest dated August 8, 1924, and to conference held October 19, 1925.

You are advised that after a thorough review of your case the Bureau holds that no exceptional hardship evidenced by a gross disproportion between the tax computed without the benefit of Section 327 and the tax computed with reference to representative corporations specified under Section 328 owing to abnormal conditions affecting your capital or income, has been disclosed.

The conclusions set forth in Bureau letter to you dated July 15, 1924 are, therefore, sustained.

A copy of this letter has been furnished your duly authorized representative, Mr. J. Austin Smith, Munsey Building, Washington, D. C.

spf-6.

3. Petitioner filed its petition for redetermination of its income and profits taxes by the United States Board of

29 Tax Appeals on January 25, 1926, with the Secretary of the United States Board of Tax Appeals.

4. The cause came on for hearing on December 1, 1927, at which time petitioner introduced no evidence and respondent, at petitioner's request introduced three so-called income and profits tax waivers, which were admitted in evidence and marked Respondent's Exhibits A, B and C. True copies of said Respondent's Exhibits A, B and C are attached hereto and made a part hereof, and incorporated by reference as a part of this petition for review. It was stipulated that petitioner's income and profits tax return for 1918 was filed on June 15, 1919, with the Collector of Internal Revenue. No other evidence was introduced, and the case was submitted on briefs.

5. On May 4, 1928, the United States Board of Tax Appeals rendered its decision in favor of respondent and on May 7, 1928, entered its order redetermining the deficiency at \$9,415.29, the amount stated in respondent's notice of deficiency hereinabove quoted.

6. In his answer to petitioner's petition respondent admitted petitioner's incorporation, the mailing of the notice of deficiency notice and the amount of the deficiency therein claimed, all as above set forth herein.

Your petitioner believes and avers that errors were committed by the Board, to his damage and prejudice, as
30 shown by the following:

Assignments of Error.

1. The Board erred in that there was no evidence before it sufficient to enable it to determine that there was a deficiency.

2. The Board erred in that it failed to hold that the time within which a deficiency could be assessed had elapsed, and to enter its order that there was no deficiency as provided in such cases by section 906, subdivision (e) of the Revenue Act of 1924, as amended by section 1000 of the Revenue Act of 1926.

3. The Board erred in holding that there is no mandatory provision in the Revenue Act of 1926 that respondent should mail a notice of deficiency after the enactment of that act, where the determination has been made and notice has already been mailed prior to its enactment.

4. The Board erred in holding that section 283 (b) of the Revenue Act of 1926 specifically gives the Board jurisdiction without qualification of an appeal filed from a notice mailed prior to the enactment of that Act and pending at the time of the enactment.

5. The Board erred in failing to hold that section 283 (a) and section 283 (b) of the Revenue Act of 1926 must be read together and provided that a deficiency pending at the time of the enactment of the Revenue Act of 1926 is required to be assessed and collected in the same
31 manner, and subject to the same provisions and limitations as in the case of a deficiency in tax imposed by Title II of the Revenue Act of 1926.

6. The Board erred in quoting section 277 (b) of the Revenue Act of 1924 and then stating that similar provisions appear in the Revenue Act of 1926.

7. The Board erred in failing to hold that section 277 (b) of the Revenue Act of 1926 suspends the running of the statute of limitations only after the mailing of a notice under subdivision (a) of section 274 of the Revenue Act of 1926.

8. The Board erred in failing to find that the waivers constituting Respondent's Exhibits A, B and C were ineffective to waive any limitation provisions of the Revenue Act of 1926.

9. The Board erred in holding that this case does not fall within the doctrine of *Toxaway Mills, Inc. v. United States*, 61 Court of Claims, 363, and the Supreme Court's reversal thereof, without opinion, March 14, 1927.

Wherefore your petitioner prays that the decision of the Board of Tax Appeals entered herein against it be reviewed and reversed by this Honorable Court, and for such other and further relief as the Court may deem meet and proper in the premises.

NEIMAN-MARCUS COMPANY,

Petitioner.

By DONALD HORNE,

Attorney.

32 STATE OF NEW YORK,
 County of New York, ss:

Donald Horne, being duly sworn, deposes and says that he is attorney for petitioner, that he knows the contents of the foregoing petition, that to the best of his knowledge and belief the statements therein are true, and that the assignments of error are well taken and intended to be argued.

DONALD HORNE.

Subscribed and sworn to before me this 31st day of August, 1928.

[SEAL.]

C. G. SMITH,
Notary Public.

33 RESPONDENT'S EXHIBIT "A."
(1435m.) *Income and Profits Tax Waiver.*

February 8, 1924.

In pursuance of the provisions of subdivision (d), Section 250 of the Revenue Act of 1921, Neiman-Marcus Company of Dallas, Texas and the Commissioner of the Internal Revenue hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax acts, or under Section 38 of the Act entitled "An Act to provide revenue, increase duties and encourage the industries of the United States and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for the period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the year or years mentioned.

(Sgd.)

NEIMAN-MARCUS CO.,

Taxpayer.

(Sgd.) D. H. BLAIR,

[SEAL.]

Commissioner.

34

RESPONDENT'S EXHIBIT "B."

(510m.)

Income and Profits Tax Waiver.

(For Taxable Years Ended Prior to March 1, 1921.)

April 20, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Company, a taxpayer of Main and *Evary* Streets, Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Sgd.) NIEMAN-MARCUS CO.,

Taxpayer.

By HERBERT MARCUS,

Pres.

(Sgd.) D. H. BLAIR,

[SEAL.]

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

RESPONDENT'S EXHIBIT "C."

Income and Profits Tax Waiver.

For Taxable Years Ended Prior to January 1, 1922.

Form 872A.

Treasury Department, Internal Revenue Service.

Oct. 23, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Co., a taxpayer of Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Sgd.)

NEIMAN-MARCUS CO.,

Taxpayer,

By HERBERT MARCUS,

Pres.

(Sgd.)

D. H. BLAIR,

[SEAL.]

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Now, January 16, 1929, the foregoing petition for review certified from the record as a true copy.

[Seal Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

36 Filed Jan. 8, 1929, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Statement of Evidence.

The following evidence was introduced at the hearing of the above-entitled appeal on December 1, 1927:

1. It was stipulated that petitioner's income and profits tax return was filed with the Collector of Internal Revenue on June 15, 1919.

2. Respondent introduced in evidence an income and profits tax waiver dated February 8, 1924, which was admitted in evidence as Respondent's Exhibit "A." A true copy of said Exhibit is as follows:

"February 8, 1924.

Income and Profits Tax Waiver.

In pursuance of the provisions of subdivision (d), section 250 of the Revenue Act of 1921, Neiman-Marcus Company of Dallas, Texas and the Commissioner of the Internal Revenue hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax acts or under Section 38 of the Act entitled "An Act to provide revenue, increase duties and encourage the industries of the United States and for other purposes,"

approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for the period of one year after the expiration of the statutory period of limitation or the statutory period of limitation as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the year or years mentioned.

(Sgd.)

NEIMAN-MARCUS CO.,

Taxpayer.

(Sgd.)

D. H. BLAIR,

Commissioner.

[SEAL.]

3. Respondent introduced in evidence an income and profits tax waiver dated April 20, 1925, which was admitted in evidence as Respondent's Exhibit "B." A true copy of said Exhibit "B" is as follows:

Income and Profits Tax Waiver.

(For Taxable Years Ended Prior to March 1, 1921.)

"April 20, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Company, a taxpayer of Main and Ervay Sts., Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number

of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Sgd.)

NEIMAN-MARCUS CO.,

Taxpayer,

By HERBERT MARCUS, *Pres.*

(Sgd.)

D. H. BLAIR,

Commissioner.

[SEAL.]

38 If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

4. Respondent introduced in evidence an income and profits tax waiver dated October 23, 1925, which was admitted in evidence as Respondent's Exhibit "C." A true copy of said Exhibit "C" is as follows:

Income and Profits Tax Waiver.

For Taxable Years Ended Prior to January 1, 1922.

Oct. 23, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Co., a taxpayer of Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1918 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended 60 days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of

days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Sgd.)	NEIMAN-MARCUS CO.,
	<i>Taxpayer,</i>
	By HERBERT MARCUS, <i>Pres.</i>
(Sgd.)	D. H. BLAIR,
	<i>Commissioner.</i>

[SEAL.]

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.”

No other evidence was offered by either party. The only other facts before the Board of Tax Appeals were those contained in the pleadings.

DONALD HORNE,
Attorney for Petitioner.

Dated January 7, 1929.

Approved:

C. M. CHAREST,
General Counsel Bureau Internal Revenue.

Approved and ordered filed January 8, 1929.

(Signed)	LOGAN MORRIS,
	<i>Member.</i>

Now, January 16, 1929, the foregoing statement of evidence certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

40 Filed Sept. 28, 1928, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11273.

NEIMAN-MARCUS COMPANY

VS.

COMMISSIONER OF INTERNAL REVENUE.

*Stipulation for Review by Court of Appeals of District of
Columbia.*

It is hereby stipulated and agreed by and between counsel for petitioner and counsel for respondent that in accordance with the provision of Section 1002, Sub-Division D of the Revenue Act of 1926, the above entitled decision may be reviewed by the Court of Appeals of the District of Columbia.

Dated at Washington, D. C., this 24th day of August, 1928.

NEIMAN-MARCUS COMPANY,

Petitioner,

By DONALD HORNE,

Attorney.

(Sgd.) C. M. CHAREST,

Atty. for Respondent.

Now, January 16, 1929, the foregoing stipulation for review certified from the record as a true copy.

[Seal Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

41 Filed Oct. 13, 1928, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,

VS.

THE COMMISSIONER OF INTERNAL REVENUE, Respondent.

To the Clerk:

Please prepare transcript on appeal to the Court of Appeals of the District of Columbia in the above-named matter, including the following:

1. Petition verified by Counsel.
2. Petition verified by President of Petitioner, filed May 8, 1926.
3. Answer.
- 4 and 5. Statement of Evidence.
6. Findings of Fact and Opinion of Board of Tax Appeals.
7. Stipulation that appeal may be taken to Court of Appeals of District of Columbia.

Respectfully,
(Signed)

DONALD HORNE,
Attorney for Petitioner.

Dated October 12, 1928.

Now, January 16, 1929, the foregoing præcipe certified from the record as a true copy.

[Seal Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

42 Filed Dec. 4, 1928, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket #11273.

NEIMAN-MARCUS COMPANY, Petitioner,
vs.

THE COMMISSIONER OF INTERNAL REVENUE, Respondent.

Supplemental Præcipe.

To the Clerk of the United States Board of Tax Appeals:

In preparing the record in the above-entitled case you will please include therein:

1. The stipulation filed May 27, 1926, to the effect that the answer of the Commissioner filed to the first petition may be considered the answer to the second petition.

2. Order of redetermination of the Board entered May 7, 1928.

(Signed)

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Of Counsel:

CLARK T. BROWN,

Special Attorney, Bureau of Internal Revenue.

sdc.

Now, January 16, 1929, the foregoing supplemental præcipe certified from the record as a true copy.

[Seal Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

43 United States Board of Tax Appeals.

Docket No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,
v.

COMMISSIONER OF REVENUE, Respondent.

Order Enlarging Time.

For cause appearing of record, it is

Ordered that the time for filing certified copies of record papers *sur* petition for review of the above entitled pro-

ceeding in the Court of Appeals for the District of Columbia be and it is hereby extended to February 15, 1929.

(Signed)

B. H. LITTLETON,

Member U. S. Board of Tax Appeals.

Dated Washington, D. C., January 30, 1929.

B. D. GAMBLE,

Clerk of U. S. Board of Tax Appeals.

A true copy. Teste:

[Seal Board of Tax Appeals, 1924.]

B. D. GAMBLE, *Clerk.*

44 United States Board of Tax Appeals.

Docket No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of council for the petitioner, it is

Ordered that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled preceeding in the Court of Appeals, District of Columbia, be and it is hereby extended to January 30, 1929.

(Signed)

B. H. LITTLETON,

Member U. S. Board of Tax Appeals.

A true copy: Teste:

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Dated Washington, D. C., December 28, 1928.

45 United States Board of Tax Appeals.

Docket No. 11273.

NEIMAN-MARCUS COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals, District of Columbia, be and it is hereby extended to December 31, 1928.

(Signed)

B. H. LITTLETON,

Member U. S. Board of Tax Appeals.

Dated Washington, D. C., November 27, 1928.

A true copy. Teste:

[Seal Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 4914.
Neiman-Marcus Company, appellant, vs. Commissioner of
Internal Revenue. Court of Appeals, District of Columbia.
Filed Jan. 31, 1929. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR 10 1929

Henry W. Hodges
Clerk.

Court of Appeals
OF THE DISTRICT OF COLUMBIA.

4914
No. ~~4904~~

NEIMAN-MARCUS COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER

DONALD HORNE,
Attorney for Petitioner.

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Court of Appeals

OF THE DISTRICT OF COLUMBIA.

NEIMAN-MARCUS COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

No. 4904

BRIEF FOR PETITIONER.

Statement of the Case.

This is an appeal from a decision of the United States Board of Tax Appeals in favor of the Commissioner of Internal Revenue. In that decision the Board redetermined the deficiency in income and profits taxes for 1918 at \$9,415.29. The questions involved in this appeal from the decision of the Board are:

1. Was the evidence before the Board insufficient to justify the finding of a deficiency by the Board?
2. Had the time within which an assessment of a deficiency might be made expired prior to the date of the redetermination by the Board?

The first is a question of burden of proof; the second, of limitation of time. An affirmative answer to either question should require a reversal of the Board's decision.

Statement of Facts.

Petitioner filed its income and profits tax return on June 15, 1919 (Tr., pp. 16, 29). Thereafter it filed three so-called "waivers," which constitute Respondent's Exhibits "A," "B" and "C." These exhibits read as follows:

"RESPONDENT'S EXHIBIT 'A.'"

INCOME AND PROFITS TAX WAIVER.

February 8, 1924.

In pursuance of the provisions of subdivision (d), Section 250 of the Revenue Act of 1921, Neiman-Marcus Company of Dallas, Texas and the Commissioner of Internal Revenue hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax acts, or under Section 38 of the Act entitled 'An Act to provide revenue, increase duties and encourage the industries of the United States and for other purposes,' approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for the period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the year or years mentioned.

(Sgd.) NEIMAN-MARCUS Co.,
Taxpayer.

(Sgd.) D. H. BLAIR,
(Seal) Commissioner.

“RESPONDENT’S EXHIBIT ‘B.’

INCOME AND PROFITS TAX WAIVER.

(For Taxable Years Ended Prior to
March 1, 1921.)

April 20, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Company, a taxpayer of Main and Evary Streets, Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income-excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Sgd.) NEIMAN-MARCUS CO.,

Taxpayer,

By HERBERT MARCUS,

Pres.

(Sgd.) D. H. BLAIR,

(Seal)

Commissioner.”

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.”

"RESPONDENT'S EXHIBIT 'C.'"

INCOME AND PROFITS TAX WAIVER.

For Taxable Years Ended Prior to
January 1, 1922.

Form 872A.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE.

Oct. 23, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Neiman-Marcus Co., a taxpayer of Dallas, Texas, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Sgd.) NEIMAN-MARCUS Co.,
Taxpayer.

By HERBERT MARCUS,
Pres..

D. H. BLAIR,

(Seal)

Commissioner..

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

Respondent, by a deficiency notice, dated November 27, 1925, notified petitioner that an audit of its income and profits tax return for 1918 had resulted in the determination of a deficiency in tax of \$9,415.29, as shown in Bureau letter dated July 15, 1924. The deficiency notice does not state the facts or grounds upon which the asserted deficiency was determined.

The appeal came on for hearing before the Board on December 1, 1927. At that time it was stipulated that petitioner's return was filed on June 15, 1919, and the so-called "waivers" were introduced as above stated. No other evidence was taken by either side.

Upon these facts, and no others, the Board redetermined the deficiency at \$9,415.29, the amount asserted by respondent. Petitioner contends that the Board had insufficient evidence to support any redetermination of a deficiency, and could properly hold only that there was no deficiency.

Petitioner also contends that the time within which any deficiency could be assessed against it expired before the Board rendered its decision, and that in such cases Section 906, subdivision (e) of the Revenue Act of 1924, as amended by Section 1000 of the Revenue Act of 1926, requires that the Board enter its order that there is no deficiency.

*Argument.***POINT I.**

The evidence before the Board was insufficient to justify the finding of a deficiency by the Board.

The Board was not advised how the alleged deficiency was determined. It had before it no fact whatever relating to the deficiency, except the bare fact that the Commissioner of Internal Revenue had determined a deficiency.

The question now raised is this: When a taxpayer files an appeal with the Board of Tax Appeals, after receiving a notice that the Commissioner of Internal Revenue has determined a deficiency, is the Board justified, in the absence of further proceedings establishing the correctness of the Commissioner's determination, in making any finding of fact that there is a deficiency, or in rendering any decision except that the Commissioner's determination has not been established?

The Board proceeds on the theory that the Commissioner's official act is presumptively correct—that is, that a public officer is presumed to do his duty correctly.

Rule 30, Board of Tax Appeals.

Atkins Lumber Co., 1 B. T. A. 317.

Pleasant Valley Ranch Co., 2 B. T. A. 335.

R. L. Crook et al., 5 B. T. A. 197.

Mrs. Browning Coleman Moore, Executrix, 5 B. T. A. 255.

Lobsitz Hardware Co., 5 B. T. A. 652.

English & Scottish Law Life Assurance Assn., 10 B. T. A. 454.

Champion Coated Paper Co., 10 B. T. A. 433, 445.

Bessemer Investment Co., 8 B. T. A. 1011, 1028.

But this is a meager ground for shifting the entire burden of proof. The burden is properly on the party making a claim, trying to collect something. He is the moving party, and has the duty of going ahead. The Commissioner's determination is nothing more than an unproved claim. Before he can assess it, he must establish its correctness before the Board of Tax Appeals, if the taxpayer files his appeal. That was the purpose of the creation of the Board—to prevent the assessment of taxes without sufficient evidence that they are due. If the Board is allowed to redetermine deficiencies merely on the presumption that the Commissioner did his duty, the intended protection of taxpayers is nullified.

It will be noted that the presumption of correctness is not extended by the Board to cover affirmative allegations in the Commissioner's answer. The Board holds that the burden is on him to prove such allegations (*E. O. Fippin*, 6 B. T. A. 350; *Schilling Grain Co.*, 8 B. T. A. 1049; *North & Balzell*, 9 B. T. A. 42; *Fred Wolferman*, 10 B. T. A. 285). This is in accordance with the general rule of procedure that the burden of going ahead is upon the party having the affirmative of the issue, which rule is just as applicable to the establishment of the deficiency claimed in the deficiency notice as it is to affirmative allegations in support of such claimed deficiency.

The functions of the Board are fixed by statute. It is not an appellate tribunal, despite the name "Board of Tax Appeals." It does not review the

record made by the Commissioner of Internal Revenue, and approve or reverse or modify it. The Commissioner keeps no record which can be made the subject of a review, as, for instance, in the case of an appeal from the Board to this Court. On the contrary, the statute requires that the Board determine the correct tax, and it begins anew, as if no proceedings had been had before the Commissioner. Consequently, it does not start with a *prima facie* case in favor of the Commissioner, which the taxpayer must disprove in order to prevail. When the proceedings before the Board begin, there is nothing before the Board but the pleadings, and the Commissioner is in the position of an ordinary litigant, as is the taxpayer. The decision of the Board must necessarily be based upon the pleadings and the evidence taken by the Board, and cannot be based, in whole or in part, upon proceedings which were had before the Commissioner prior to the appeal to the Board.

The statements contained in the preceding paragraph are so utterly inconsistent with the conduct of the Board in the instant case that it is realized they need substantiation and verification. However, the principles stated are well settled by decisions of the Board itself, which have never been questioned. In the *Appeal of E. J. Barry*, 1 B. T. A. 156, the Board said:

“When a taxpayer brings his case before the Board he proceeds by trial *de novo*. The record of the case made in the Internal Revenue Bureau is not before the Board except insofar as it may be properly placed in evidence by the taxpayer or by the Commissioner. The Board must decide each case upon the record made at the hearing before it.”

In the *Appeal of Gutterman-Strauss Co.*, 1 B. T. A. 243, the Board said:

"The Commissioner is an ordinary litigant before the Board. A case is heard before the Board as a *de novo* proceeding."

The Board also said, in the same proceeding:

"This Board was not created for the purpose of *reviewing rulings made by the Commissioner* but was created for the purpose of *determining the correctness of deficiencies in tax* found by the Commissioner. If the deficiency in tax found by him is greater than the true deficiency the Board has authority to decrease it; if it is less than the true deficiency, the Board has authority to increase it (*Appeal of the Hotel De France Co.*, 1 B. T. A. 28). If a taxpayer can prove to this Board that he is entitled to a deduction from gross income, the deduction will be allowed even though it has never been claimed by the taxpayer at any hearing had before the Commissioner; otherwise, it would be impossible for this Board to determine the correct amount of the deficiency."

The position of the taxpayer before the Board is necessarily defensive. He is not claiming anything from the Commissioner, or from the United States Government, as he would be in a claim or suit for refund. He is the party against whom a claim is being made. The claim is asserted in the deficiency notice. The taxpayer must either concede its correctness and pay it, or put the Commissioner to his proof by filing his petition in the Board of Tax Appeals.

Obviously, the filing of such petition is a defensive measure. The Commissioner still has the offensive position, or what is usually termed the affirmative of the issue. The taxpayer's pleading

should be a traverse, or denial of the allegations of the deficiency notice, and/or the statement of any affirmative defense he may have.

The Commissioner is not specifically required by the rules of the Board of Tax Appeals to set forth the grounds of his claim of a deficiency in the deficiency notice, and has not done so in this case. The result is, that since the Board has no record of proceedings had before the Commissioner, it must first be advised of the facts and theories upon which the proposed deficiency is based, before it can intelligently consider any defense that the taxpayer may have. Surely it is not required that the taxpayer present the Commissioner's case in order to establish a starting point for his defense. It is unreasonable to expect him to furnish the Board with the facts and theories upon which the Commissioner relies.

In the instant case, the deficiency notice gives no indication of the basis of the Commissioner's claim that there was a deficiency of \$9,415.29. It refers to an earlier Bureau letter dated July 15, 1924. This letter, however, was not before the Board. There are no facts, either pleaded or in evidence, which would enable the Board to determine the correct tax. The only facts pleaded are petitioner's affirmative defenses, and the only facts in evidence relate solely to the limitation of time for assessing a deficiency.

The position of the Board on this question has been repeatedly stated and is to the effect that the determination of the Commissioner, as stated in the deficiency notice, is *prima facie* evidence of its own correctness, and that, in the absence of any evidence, the Board will redetermine the deficiency as found by the Commissioner. The Board's position is embodied in its Rule No. 30, which reads:

“Rule 30. Burden of Proof. The burden of proof shall be upon the petitioner, except that in respect of any new matter of fact pleaded in his answer, it shall be upon the respondent.”

In numerous cases the Board has approved the determination of the Commissioner, although no evidence was offered in its support, because the petitioner did not prove that that determination was wrong (see citations above).

It must be obvious that in many cases it would be impossible for the petitioner to prove that the Commissioner's determination was wrong, even though that determination was purely arbitrary. This is particularly true when the pleadings on the part of the Commissioner are silent as to how he arrived at his determination. The petitioner has no point of attack. There is nothing before the Board to show the nature of the claim which he is contesting.

The question thus raised is not merely a question of evidence, but involves the correctness of the entire procedure before the Board. The taxpayer, occupying as he does a defensive position, should be permitted to deny the allegations upon which the claim against him is based, and thus put them in issue, *instead of being required to plead negative allegations.*

The proper opening pleading is the deficiency notice. This should allege the facts upon which the Commissioner's claim is based. The proper starting point is the taxpayer's return. The deficiency notice should show wherein the facts and calculation in the return are questioned, as the deficiency asserted is the difference between the amount shown on the return, sworn to by the taxpayer, and the amount which the Commissioner

asserts is the correct tax (Sec. 273, Rev. Act of 1924; Sec. 273, Rev. Act of 1926). The taxpayer would then be in a position to deny such allegations or to admit them and allege affirmative defenses if he has any.

There would be no difficulty then in presenting the evidence. The Commissioner could subpoena the books and records of the taxpayer, and, upon failure to secure them, could introduce secondary evidence. He has, in all cases, such evidence available, by virtue of field examinations, which, in practically all cases, are responsible for the assertion of the deficiency claim.

Undoubtedly, the taxpayer does and should have the burden of proving its affirmative defenses; but his negative defenses, which would ordinarily consist of denials of the allegations of the Commissioner's statement of his claim, cannot even be stated until the Commissioner's claim is alleged. In the instant case, the deficiency notice states no facts except that the Commissioner claims a deficiency in the sum of \$9,415.29. Under the circumstances, the taxpayer can only deny the existence of such deficiency—which he does by filing a petition—but cannot offer any evidence to support such denial because there are no specific allegations to disprove.

The petitioner's only alternative would be to introduce evidence to prove the items of the Commissioner's claim, and then to testify as to each such item. In other words, the taxpayer would have to prove what the Commissioner's claim consisted of, before he could begin to defend himself against it. If, because of the death of a witness or the loss of real evidence, for any reason, there was a failure of proof, the Commissioner would be given judgment, because of the taxpayer's failure to prove what the Commissioner's claim consisted of.

In the instant case, no evidence whatever was introduced except as to waivers with respect to limitation of time to assess. The Board was not equipped with information which would enable it to redetermine the deficiency. Nevertheless, it decided that there was a deficiency, although totally uninformed as to the correct tax liability which it is required by the statute to determine.

A proceeding before the Board takes the place of a suit to collect tax, and also of proceedings to recover a refund. In other words, the Board proceedings take the place of court proceedings to determine the correct tax, but an appeal lies to the appellate courts, as in the case of the instant appeal. In a suit to recover a refund, the burden would be upon the taxpayer; but in a suit brought by the Government against the taxpayer to collect additional tax the burden would be upon the Government to establish, at least *prima facie*, that the additional tax sued for is due. In such a suit the determination of the Commissioner carries no presumption of correctness (*Little Miami & C. & X. R. Co. v. United States*, 108 U. S. 277).

The situation is quite different where suit is brought *after* assessment has been made. An assessment of a tax is *prima facie* evidence that it is due and correct. But the reason for this is that an assessment is a quasi-judgment, theoretically based upon examination and consideration of facts by officers of the Government acting in a semi-judicial capacity. This has been long recognized (*Western Express Co. v. United States* [C. C. A.], 141 Fed. 28, 30; *United States v. Rindskopf*, 105 U. S. 418). It is because of this quasi-judgment character that an assessment can be collected, as if it were a judgment, by distraint and sale of the taxpayer's property. Since an assessment can be the basis of such a proceeding it is no wonder

that it is considered as sufficient, of itself, to shift the burden of proof to the taxpayer in a suit to collect tax. But the notice of a deficiency is not an assessment. It is a mere statement of a claim, which the Commissioner *proposes* to assess if approved by the Board of Tax Appeals, to whom Congress has assigned the duty of sitting in a semi-judicial capacity, in order to give an assessment made pursuant to their decision its quasi-judgment character.

Congress, having conferred authority to collect any assessment by distraint, and within the same time that suit might be brought, thus giving an assessment all the force and effect that a judgment would have, attempted to provide for the evidence and judicial consideration appropriate to a judgment, and to prevent the making of any assessment without such evidence. The Board of Tax Appeals was created for this purpose, that is, to prevent the assessment of tax unsupported by facts ascertained by evidence, unless the taxpayer, by default of appealing, tacitly admits the correctness of the deficiency notice.

The Board, by its rule as to the burden of proof, in effect nullifies the law which created it. This statute was enacted primarily for the benefit of taxpayers, to insure them justice (*Russell v. United States*, decided by the Supreme Court of the United States, 22 Fed. [2nd] 249). That is why the Board was made an "independent agency in the executive department," rather than a part of the Treasury Department. But by its present rule with regard to the burden of proof, it defeats this act of justice and becomes a means of just so much more unavailing procedure and red tape.

An examination of the Board's decisions will show that in a very great number the deficiency claimed by the Commissioner is sustained because

the taxpayer failed to prove that his determination was wrong; that in practically all of the Board's findings and decisions it is impossible to discover upon what facts and grounds the proposed deficiency was arrived at; and that, in most cases where there has been a judgment of no deficiency, such judgment is based on some affirmative defense or defenses of the taxpayer, not upon disproof of the facts upon which the proposed deficiency was claimed by the Commissioner. In other words, the taxpayer seldom wins by negating the Commissioner's claim. The Board seldom learns the grounds of the Commissioner's claim. The Board decides its cases on new matter, not previously heard or considered by the Commissioner. If such new matter is not produced, the taxpayer ordinarily cannot win. This must necessarily be true; for the Commissioner (at least as to taxes for early years, that is, from 1917 to 1921 inclusive) does not generally state, in his deficiency notice, the basis of the proposed deficiency. Denial of the obligation, under oath, is not considered sufficient to overcome the presumption that the deficiency notice was correct, and the taxpayer is not confronted with any specific allegations of fact to disprove. He is placed in a position, by this unjust rule as to burden of proof, where he must either allege and prove affirmative defenses or lose.

And this, in fact, is losing, in any event. If the affirmative defenses are sound, the taxpayer is entitled to their benefit in addition to negating the facts upon which the Commissioner's claim of a deficiency is based, if those facts are untrue.

It is therefore charged that the Board of Tax Appeals, by treating the taxpayer as the moving party, and by its Rule 30, placing the burden of proof on him, has constituted itself an instrument of injustice, and has perverted the statute which

created it to be an agency of justice. It has failed repeatedly to fulfill the commandment of the statute, to determine the correct tax, and has only partially functioned as intended by Congress. The instant case, in which a deficiency was found without any evidence at all, is as appropriate as any in which to find out whether such upside down procedure is to be tolerated.

POINT II.

The time within which an assessment of the proposed deficiency can be made has elapsed, and the decision should be that there is no deficiency.

The argument on this point relates to assignments of error, in the petition for review by this Court, from 2 to 9, inclusive.

The proposed deficiency consists of alleged additional income and profits taxes for the calendar year 1918. It was stipulated that the return was filed on June 15, 1919 (R., pp. 29, 16).

The limitation of time for assessment of such tax, in existence at the time the return was due or was made, was fixed to expire five years after the return was due or was made (Sec. 250, subdiv. (d), Revenue Act of 1918). This five-year period expired on June 15, 1924. On November 23, 1921, a new revenue act was enacted, which changed this period to five years from the time the return was *filed* (using the word "filed" in place of the words "was due or was made") (Sec. 250, subdiv. (d), Revenue Act of 1921). This change in language did not alter the date of expiration of the five-year period in the instant case.

On February 8, 1924, petitioner executed and filed a so-called "income and profits tax waiver," by which it consented to a determination, assessment and collection of any income or profits tax due for 1918 within one year after the expiration of the statutory period, which waiver is Respondent's Exhibit "A" herein. If this waiver was valid and operative it extended the statutory period of limitation from June 15, 1924, to June 15, 1925.

On June 2, 1924, the Revenue Act of 1924 was enacted. This act contained new and different limitation provisions with respect to prior years' taxes, including taxes for 1918. The period of five years from the time the return was filed was increased in all cases to five years and sixty days; if an appeal was filed, it was further increased by the number of days the matter was pending before the Board of Tax Appeals [Sec. 277, subdivs. (a) and (b)]; and if the Board held that there was no deficiency, the Commissioner of Internal Revenue was authorized to bring suit against the taxpayer within one year after the final decision of the Board (Sec. 274, subd. (b), Revenue Act of 1924). The limitation provisions of the Revenue Act of 1921 were repealed (Sec. 1100, subds. (a) and (b), and Sec. 280, Revenue Act of 1924).

The Revenue Act of 1924, in Section 278, subdivision (c), contained the following provision with respect to waivers:

"(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon."

On April 20, 1925, petitioner executed a new so-called "Income and Profits Tax Waiver," which is Respondent's Exhibit "B" herein. This waiver recited that it was executed under existing Internal Revenue laws, and that it extended the time until December 31, 1925,

"except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board."

On October 23, 1925, petitioner executed a new waiver, which is Respondent's Exhibit "C," couched in language similar to Exhibit "B," except that the date of expiration was December 31, 1926.

On November 27, 1925, respondent mailed the deficiency notice. On January 25, 1926, petitioner filed its petition in the Board of Tax Appeals, alleging that the time within which the alleged deficiency might be assessed had elapsed.

On February 26, 1926, the Revenue Act of 1926 was enacted. The provisions of this Act relative to this point will be discussed hereinafter. The case came on for hearing on December 1, 1927, and the decision of the Board was rendered on May 4, 1928.

The above is a chronological statement of events pertinent to the limitation question. Petitioner contends that the time within which the alleged

deficiency might have been assessed has elapsed, and more particularly contends:

1. That the time within which the assessment might have been made elapsed June 15, 1924.

2. That, if it be held that the limitation period did not elapse on June 15, 1924, it elapsed on February 26, 1926.

3. That, in any event, the limitation period elapsed not later than May 28, 1926.

Time for Assessment Elapsed June 15, 1924.

1. Petitioner's first contention above enumerated is that the time within which the assessment might be made expired June 15, 1924. This date was five years from the time the return was filed, and was the statutory date of limitation, irrespective of waivers or consent agreements.

The first waiver was executed and filed on February 8, 1924, pursuant to the provisions of the Revenue Act of 1921, which was then in force. The waiver consented to assessment, after the expiration of the five-year period, under the provisions of the Revenue Act of 1921, and did not consent to assessment under the provisions of a subsequent Act. *The extension of time depended upon the consent of the taxpayer, and he has a right to hold the Government strictly to the terms of his consent agreement.* These terms cannot, therefore, be altered by subsequent legislation. They cannot be construed to permit assessment under the provisions of the Revenue Act of 1924. It became impossible to assess the alleged deficiency under the provisions of the Revenue Act of 1921, when that Act was repealed. At that moment, therefore, the consent agreement became null and void.

Under the provisions of the Revenue Act of 1924, the Commissioner could not make an assessment of a deficiency without first sending a notice of deficiency by registered mail. Upon the mailing of such deficiency notice, the time within which assessment might be made would have automatically been extended by a self-executing provision of the statute. If petitioner's waiver had remained in force the expiration date thereof would have been extended sixty days beyond the time agreed upon. Thus no assessment could have been made after June 15, 1924, without changing the terms of petitioner's agreement.

The Supreme Court has held that the provisions of Section 278 of the Revenue Act of 1924 do not have retroactive effect (*Russell v. United States*, 22 Fed. [2nd] 249). The Court said:

"If an assessment made before that date (June 2, 1924) comes within the ambit of Sec. 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had already expired. *United States v. Magnolia Petroleum Company*, 276 U. S. 160, declares 'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.' No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 278 or otherwise."

The words of subdivision (c) of Section 278 do not indicate a plain purpose to apply to consents in writing executed prior to June 2, 1924.

Thus the enactment of the Revenue Act of 1924 itself invalidated petitioner's consent agreement. It rendered impossible the making of an assessment after June 15, 1924, without altering the terms of petitioner's agreement. If, after the enactment of the Revenue Act of 1924, the waiver continued to have any validity, it extended the time for assessment sixty days longer than petitioner consented to. Petitioner did not consent to subject itself to any such provision of law. Consequently, as soon as such provision of law became operative, and affected its consent agreement, the latter became void.

There is another way of approaching the problem. Under the Revenue Act of 1924, the Commissioner can comply with the limitation provisions of the statute by sending a notice of deficiency by registered mail. Thereupon the time for making the assessment was automatically extended sixty days. If petitioner's waiver remained effective, the Commissioner could, by sending a deficiency notice, have complied with the time limitation as extended by petitioner's agreement, and could have taken additional time, not consented to by petitioner, to make the assessment. The consent agreement cannot be interpreted as subjecting petitioner to any such future provision.

The general rule is that a waiver extends to rights existing when it is made. A waiver made under the provisions of a statute does not have the effect of waiving the provisions of a subsequent statute. *Toraway Mills v. United States*, 61 Ct. Cl. 363, 5 Am. Tax Rep. 5714, affirmed on this point by the Supreme Court, 273 U. S. 781. A taxpayer, by consenting to an extension of time for assessment under existing law, does not consent to such extension after the enactment of a new statute imposing

further burdens. Hence, when the statute existing at the time the waiver was executed was repealed, a waiver of its provisions was simultaneously nullified. It could not properly be held to apply to a subsequent statute containing new burdensome provisions.

The Revenue Act of 1924 contained other burdensome provisions besides the provision extending the period stated in the waiver. For example, it prohibited the filing of claims for abatement, except in case of a jeopardy assessment (Sec. 279, subd. [d]). Petitioner did not consent to an assessment, after the expiration of the five-year period, under this condition.

There is no doubt that the Revenue Act of 1921 was repealed, so far as the provisions for and limitations upon the assessment of deficiencies is concerned. The saving clause (Sec. 1100 [b]) applies only "except as provided in Section 280." In other words, it does not apply to income and profits tax provisions. Section 280 of the Revenue Act of 1924 reads:

"SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the pro-

visions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277."

From the language of Section 280 it is clear that the assessment and limitation provisions of the Revenue Act of 1921 were entirely repealed, and that any assessment must be made in accordance with the provisions and limitations of the Revenue Act of 1924.

The best definition of the instrument under consideration, commonly called "Income and Profits Tax Waiver" is contained in the opinion of the Board of Tax Appeals in the *Appeal of Wirt Franklin*, 7 B. T. A. 636, at page 639, which reads:

"The instrument under consideration is denominated an 'income and profits-tax waiver.' It is in fact a bilateral undertaking entered into by the parties pursuant to the statute. Technically, it is not a waiver of the statute, for it is made pursuant to the statute. It is not an acknowledgment of any existing obligation or a new promise to pay, from which a new cause of action arises, thus beginning anew the period of limitation. It is not an agreement not to plead the statute of limitations as a defense to any asserted tax liability. In short, it is not something to be considered as in avoidance of the statute. By the statute, and by its terms, it operates to extend the time."

If this definition is correct, the extension of time depends upon a bilateral agreement pursuant to and authorized by the statute. The agreement would not be effective without the statutory provision, and the statute would not extend the time without the agreement. The repeal of the statute would consequently annul the agreement. A new

statute could not be substituted without the consent of the parties.

The agreement might have continued to have force and effect, if one of two things had happened: First, if the agreement had shown by its terms that it was to continue in force under subsequent statutes, or, second, if the repeal of the statute under which it was executed had had a saving clause permitting the assessment to be made under the provisions of the former Act. Neither of these conditions occurred. The terms of the agreement show clearly that only existing law was contemplated; and, as above shown, there was no saving clause applicable to the deficiency in question.

Subsequently, while the Revenue Act of 1924 was in force, two additional agreements were executed, Respondent's Exhibits "B" and "C." Under the decision of this Court in *Joy Floral Co. v. Commissioner of Internal Revenue*, 29 Fed. (2nd) 865, these waivers were of no validity, if the first waiver, Respondent's Exhibit "A," was nullified by the repeal of the Revenue Act of 1921.

Petitioner relies upon the decision of the United States Supreme Court in the case of *Toxaway Mills, Inc., v. United States*, *supra*. In that case, the plaintiff executed a waiver while the Revenue Act of 1918 was in force, waiving the statutory period for assessment. After the enactment of the Revenue Act of 1921, the Commissioner assessed a deficiency, which plaintiff paid, and sued to recover, on the ground that the assessment was made after the limitation had elapsed. The Court of Claims stated that a waiver, standing alone, would not have the effect of waiving the provisions of a subsequent statute, the general rule being that a waiver extends only to rights existing when it was made. But the Court held that the parties treated

the waiver as continuing after the enactment of the new statute, and on this basis gave judgment for the Government. The Supreme Court reversed this decision, without opinion, and ordered judgment to be entered for plaintiff.

Such judgment can rest only on the ground that there was no valid waiver after the enactment of the Revenue Act of 1921—in other words, that the waiver was nullified by the repeal of the statute under which it was executed. There is no other possible basis for the judgment. No evidence was introduced as to the merits. If the waiver had continued valid after the enactment of the Revenue Act of 1921, the collection of tax was timely and legal, and judgment would necessarily have been for defendant.

The Board of Tax Appeals, in its opinion in the instant case, disposed of the *Toxaway Mills* decision by the following sentence:

“We have examined the case of *Toxaway Mills, Inc.*, 61 Court of Claims 363, and 63 Court of Claims 646, but are unable to agree with counsel for the petitioner that the instant case falls within the doctrine laid down therein.”

Apparently, the Board overlooked the action of the Supreme Court in this matter and the effect thereof.

It is submitted that the time within which assessment of the alleged deficiency might have been made expired June 15, 1924, and was not revived by subsequent events.

If limitation period be held extended by first waiver, it expired February 26, 1926.

The continuing waiver theory was considered by the Supreme Court to have so little merit that it reversed the Court of Claims decision in the *Tox-*

away Mills, Inc., decision, *supra*, without an opinion. Nevertheless, if it be held that petitioner's first waiver (Exhibit "A") should be considered as continuing because subsequent waivers indicated that it was treated as such—although this is contrary to the doctrine of the *Joy Floral Company* appeal, decided by this Court—nothing was done after the enactment of the Revenue Act of 1926 which could be construed as a consent to the extension of time for making the assessment after that date.

The Revenue Act of 1926 repealed the Revenue Act of 1924, and, as in the case of the former Act, contained no saving clause applicable to income or profits taxes. The only saving clause operated only "except as provided in Section 283." Section 283 provided that income and profits taxes imposed by previous Acts could be assessed only under the provisions and limitations of the Revenue Act of 1926, and in addition provided for an imposition of interest on deficiencies not previously provided for, and to which petitioner did not consent. This Act also contained other burdensome provisions to which petitioner did not consent.

Petitioner filed its appeal in the Board of Tax Appeals on January 25, 1926, before the enactment of the Revenue Act of 1926. As above shown, the waivers were annulled by the Revenue Act of 1926, if they had any validity at that time. The question remains whether the pendency of the appeal in the Board of Tax Appeals operated to suspend the running of the limitation period if it had not already expired.

Petitioner pleaded in its petition filed with the Board that the time within which assessment of the alleged deficiency might have been assessed had expired. This negatives acquiescence in any suspension of the limitation period after the appeal was taken.

As above shown, the repeal of the Revenue Act of 1924 annulled any suspension of the limitation provided for by that Act. This is not cured by Section 283, subdivision (1) of the Revenue Act of 1926, as the operation of this provision is dependent upon the operation of Section 277, subdivision (b). Neither provision is self-executing, but both begin to operate only when the condition stated in Section 277, subdivision (b), is performed.

That condition has not been performed. No notice under subdivision (a) of Section 274 of the Revenue Act of 1926 has been mailed.

For the convenience of the Court, the provisions referred to are quoted as follows:

Section 277 (b) :

"The running of the Statute of Limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

Section 283 (1) :

"In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of sus-

pension provided for in subdivision (b) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court."

Petitioner's contention is that these sections authorize a suspension of the limitation provisions only "after the mailing of a notice under subdivision (a) of Section 274." The language is clear and unambiguous, and leaves no room for doubt or construction.

The Revenue Act of 1926 contained many retroactive changes in substantive law, as well as procedural changes, some of which were disadvantageous to taxpayers, and it was apparently contemplated that the Commissioner must send a new notice of deficiency setting forth his claim under the new legislation. Section 283, subdivision (b) provided that where the appeal had been filed before the enactment of this Act, the Board should have jurisdiction of the appeal, under the following conditions:

"In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section."

Subdivision (a) provides, among other things, that

"the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been

enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act."

In order to assess a deficiency imposed by the Revenue Act of 1926, the Commissioner must send a notice of deficiency by registered mail, *after the enactment of that Act*. This, then, is necessarily one of the conditions of assessing a tax imposed by a former Act, even though the Board of Tax Appeals already has jurisdiction of the matter. The jurisdiction of the Board is limited to conform to the provisions of Section 283, subdivision (b). The fact that a notice of deficiency has been sent prior to the enactment of the Revenue Act of 1926 is not compliance with the provisions of Section 283, subdivision (b) of that Act. Clearly the Board had no jurisdiction to determine a deficiency in the absence of such notice, since the Commissioner had no authority to assess such deficiency, if found; and the limitation of time on assessments was not suspended in the absence of mailing such notice. As above shown, the limitation provisions are suspended only after the mailing of a notice of a deficiency under the provisions of Section 274, subdivision (a) of the Revenue Act of 1926.

It is a well settled principle of law that a tax must be assessed and collected strictly in accordance with the provisions of law authorizing such assessment and collection. A taxpayer is entitled to strict compliance with the law. Neither the

Board of Tax Appeals nor the Courts can authorize a different procedure. These statements are elementary.

In the instant case the mailing of a notice after the enactment of the Revenue Act of 1926 would not revive the period for assessment, if the above contentions are correct, for the reason that that period would have expired before such notice could be sent. But there are many cases in which that would not be true, as, for example, cases in which fraud is charged, there being no limitation period in such cases; or cases in which the return was not filed more than five years before the enactment of the Revenue Act of 1926; or cases in which the consent agreement expressly waived future legislation.

Petitioner therefore submits that the time within which the assessment might be made elapsed February 26, 1926, if it had not already elapsed as heretofore contended.

The period for assessment elapsed, in any event, not later than May 28, 1926.

This alternate contention is based solely on the fact that the Revenue Act of 1924 did operate to extend the period (if not already expired when the deficiency notice was mailed) until repealed, and that Section 283, subdivision (1) of the 1926 Act, may be held to have carried into effect that extension, even though Section 277, subdivision (b), did not operate.

The deficiency notice was mailed November 27, 1925. The number of days from that date until the enactment of the Revenue Act of 1926, on February 26, 1926, was ninety-one, and ninety-one days from February 26, 1926, was May 28, 1926, which was the last date on which the deficiency could have been assessed on this hypothesis.

The Assignments of Error.

Having discussed the law, it is now proposed to discuss briefly each error assigned, in order.

1. It is sufficient to say that the Board had no evidence before it to enable it to redetermine the alleged deficiency. The notice of deficiency was a mere claim, and carried no presumption of correctness sufficient to shift the burden of proof upon petitioner.

2. Since the time for assessment had elapsed, the Board should have entered judgment that there was no deficiency. Section 906, subdivision (e) of the Revenue Act of 1926, as amended by Section 1600 of the Revenue Act of 1926.

3. Section 283 (a) of the Revenue Act of 1926 requires that taxes imposed by former Acts must be assessed and collected subject to the provisions and limitations upon the assessment and collection of taxes imposed by the Revenue Act of 1926. This requires the mailing of a notice after the enactment of the Revenue Act of 1926.

4. Section 283 (b) of the Revenue Act of 1926 gives the Board jurisdiction of an appeal filed from a notice mailed prior to the enactment of that Act, *subject, however, to the provisions of Section 283 (a).*

5. Section 283, subdivisions (a) and (b) of the Revenue Act of 1926, must be read together, because subdivision (b) specifically refers to subdivision (a). The two subdivisions together provide that a deficiency pending at the time of the enactment of the Revenue Act of 1926 must be assessed and col-

lected in the same manner, and subject to the same provisions and limitations as in the case of a tax imposed by the Revenue Act of 1926, and the Board must abide by such provisions and limitations in determining the appeal.

6. The provisions of Section 277 (b) of the Revenue Act of 1926 differ very materially from the provisions of Section 277 (b) of the Revenue Act of 1924. The addition of the words "after the mailing of a notice under subdivision (a) of Section 274" is all important in the 1926 provision. It means that the provision does not begin to operate until such notice is mailed. This specific statutory language cannot be ignored. It does not refer to a notice mailed before Section 274, subdivision (a), was enacted. It was gross error for the Board to say the two provisions were identical (R. p. 20).

7. Section 277, subdivision (b) of the Revenue Act of 1926, provides in its own language when it shall suspend the running of the statute. The Board erred in failing to hold that it did not suspend the limitation period, since no notice of deficiency was mailed under Section 274 (a) of the Revenue Act of 1926.

8. The waivers did not waive any limitation provisions of the Revenue Act of 1926 for the following reasons, as hereinbefore fully set forth:

(a) The first waiver was annulled by the repeal of the Revenue Act of 1921.

(b) The other two waivers were executed after the limitation period had expired.

(c) The waivers, if they had any continuing effect whatever, were annulled by the re-

peal of the Revenue Act of 1924, after the expiration of the limitation period had been pleaded, since nothing occurred after such repeal which could be construed as consenting to further continuance.

9. The invalidity of the waivers is supported by the action of the Supreme Court of the United States in *Toraway Mills, Inc. v. United States*, 273 U. S. 781.

Wherefore, the decision of the Board of Tax Appeals should be reversed, and it should be held that there was no deficiency.

Respectfully submitted,

DONALD HORNE,
Attorney for Petitioner.

FOR MR. CHIEF JUSTICE MARTIN.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 27 1921

Henry M. Higgins

No. 4914

Reed

In the Court of Appeals of the District
of Columbia

NEIMAN-MARCUS COMPANY, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR THE APPELLEE

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APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR THE APPELLEE

OPINION BELOW

The only previous opinion in the present case is that of United States Board of Tax Appeals (R. 17-20) which is reported in 11 B. T. A. 1036.

JURISDICTION

The appeal in the above-entitled cause involves income and profits taxes for the calendar year 1918 in the sum of \$9,415.29 and is taken from a decision (order of redetermination) of the United States Board of Tax Appeals entered on May 7, 1928. (R. 21.) This case is brought to this court by petition for review filed September 23, 1928 (R. 21), pursuant to the Revenue Act of 1926, c. 27, Sections 1001, 1002, 1003, 44 Stat. 9, 109, 110.

(1)

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app Feb 24/19

QUESTIONS PRESENTED

1. Whether the Board of Tax Appeals erred in treating the Commissioner's determination of a deficiency as *prima facie* correct, and in recognizing that the burden of proof was upon appellant.

2. Whether assessment of the deficiency asserted by the Commissioner for the year 1918 is barred by the statute of limitations provided by Section 250 (d) of the Revenue Act of 1918 and subsequent Acts and extended by waivers executed by appellant and the Commissioner.

STATUTES INVOLVED

The provisions of the Revenue Acts involved are contained in the appendix to this brief.

STATEMENT OF FACTS

Appellant, a corporation organized under the laws of Texas with its principal place of business in Dallas, filed its income and profits-tax return for the year 1918 on June 15, 1919. (R. 15, 16.)

Under date of February 8, 1924, appellant and the Commissioner of Internal Revenue executed a written consent to extend for one year the time prescribed by law for the determination, assessment, and collection of appellant's income and profits taxes due under its return for 1918. (R. 16.) On April 20, 1925, the same parties executed another written consent extending the time prescribed by law for the assessment of the taxes in

question until December 31, 1925, "except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board." (R. 16-17.)

On October 23, 1925, appellant and the Commissioner executed a further waiver, couched in language similar to the waiver of April 20, 1925, except that the date of expiration was December 31, 1926. (R. 17.)

The Commissioner mailed a deficiency notice to the taxpayer on November 27, 1925, showing therein a deficiency of \$9,415.29, and appellant appealed to the Board of Tax Appeals, contending that the assessment of the deficiency was barred by the statute of limitations. The Board affirmed the deficiency asserted by the Commissioner and appellant now seeks review by this court.

SUMMARY OF ARGUMENT

The rule that determinations and assessments of the Commissioner of Internal Revenue are *prima facie* correct is well settled. The courts are unanimous in so holding. Rule 30 of the Board of Tax Appeals which declares that the burden of proof shall be upon petitioners in cases before the Board

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is in strict conformity with the rule laid down by the courts and has the sanction of Congress. When the reason for the creation of the Board of Tax Appeals and the nature of the proceeding before such Board are considered, the necessity for and the reasonableness of the rule becomes patent. For practical purposes the determination of the Commissioner is the equivalent of formal assessment and the fact that no assessment has yet been made in this case affords no basis for distinction. In the instant case appellant has introduced no evidence to overcome the *prima facie* presumption of correctness of the Commissioner's determination.

The taxpayer's return for 1918 was filed June 15, 1919, and under the provisions of the law then in force (Section 250 (d) of the Revenue Act of 1918), the Commissioner had until June 15, 1924, to assess the tax. This period was extended by three waivers, timely executed by the taxpayer and the Commissioner pursuant to the Revenue Acts of 1921 and 1924, until December 31, 1926. Within the allotted time and on November 27, 1925, notice of the deficiency as determined by the Commissioner was mailed to the taxpayer who filed a petition with the Board of Tax Appeals on January 25, 1926. In view of the waivers and of the applicable provisions of the several Revenue Acts affecting this question, the statute of limitations has not run against assessment and is now in suspension and will not run until some time after the decision of the Board of Tax Appeals becomes final.

ARGUMENT

I

Upon the record in this case the Board of Tax Appeals properly affirmed the deficiency determined by the Commissioner, as such determination was *prima facie* correct and appellant wholly failed to sustain the burden of proof

Appellant contends that while it is the established rule of the Board of Tax Appeals that in proceedings before it the burden of proof is upon the petitioner, this rule and its application is unjust and improper and that it works an unjustifiable hardship upon taxpayers. The fact remains, however, that this is the rule made by the Board in pursuance of legislative authority and approved by the courts.

Long before the creation of the Board of Tax Appeals and before the promulgation of its rules, it was recognized by the courts that an assessment made by the Commissioner of Internal Revenue was *prima facie* evidence of the amount of taxes due from the one against whom such assessment had been made. In the case of *United States v. Rindskopf*, 105 U. S. 418, it was said (p. 422):

The assessment of the Commissioner of Internal Revenue was only *prima facie* evidence of the amount due as taxes upon the spirits distilled between the dates mentioned. It established a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it was sufficient to justify a recovery; but every material fact upon which

his liability was asserted was open to contestation. He and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the Commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment. They were also at liberty to show a payment of the tax assessed, in whole or in part, and thus discharge or reduce the distiller's liability. To the extent, however, in which the assessment was not impaired, it was evidence of the amount due.

The Supreme Court announced the rule again in *Wickwire v. Reinecke*, 275 U. S. 101. In that case the trial court rejected evidence offered by the taxpayer to refute the determination of the Commissioner that a certain transfer had been made in contemplation of death on the theory that the finding of the Commissioner was conclusive. The Circuit Court of Appeals held that the lower court was not concluded by the finding of the Commissioner on the question of fact but nevertheless affirmed the decision on the whole record. The Supreme Court reversed the courts below, saying, in the opinion delivered by Mr. Chief Justice Taft (p. 105):

It is quite clear that, as held by the Circuit Court of Appeals, the ruling of the trial court was erroneous, and that the decision of the Commissioner of Internal Revenue was not conclusive, but only furnished *prima facie* evidence of its correctness. *United States v. Rindskopf*, 105 U. S. 148; *Fidelity & Colum-*

bia Trust Co. v. Lucas, 7 Fed. (2d) 146. Upon the issue whether the transfer had been made in contemplation of death, the burden of proof was by the terms of the statute on the petitioner, as indeed it would have been without the special provision of the statute, because she was the plaintiff. We have not set forth *in extenso* the evidence which was offered, but it is very clear that there was enough to go to the jury to meet the burden against the petitioner on this main issue, and that the Circuit Court of Appeals was in error in holding otherwise.

See also *Williamsport Co. v. United States*, 277 U. S. 551, 560.

In *Botany Mills v. United States*, 278 U. S. 282, 289, 293, it was said:

Under Sec. 12(a) of the Revenue Act of 1916 the Mills was not entitled to this deduction unless the amount paid constituted a part of its "ordinary and necessary expenses" in the maintenance and operation of its business and properties. And in this suit the burden of establishing that fact rested upon it, in order to show that it was entitled to the deduction which the Commissioner had disallowed, and that the additional tax was to that extent illegally assessed.

* * * * *

Therefore as the Mills has not sustained the burden of showing that the amount disallowed by the Commissioner was in fact part of its ordinary and necessary expenses, the judgment must, for this reason, be affirmed.

The rule has been uniformly applied by the circuit courts of appeals in holding that, on appeal to the Board of Tax Appeals, the findings and determinations of the Commissioner are *prima facie* correct. In *Avery v. Commissioner of Internal Revenue*, 22 F. (2d) 6, the Commissioner disallowed certain deductions claimed by the taxpayer and determined a deficiency accordingly. The Circuit Court of Appeals for the Fifth Circuit, in affirming the Board of Tax Appeals, said (p. 8) :

It is not urged that any evidence was improperly received or excluded, but petitioner complains that the board treated the finding of the Commissioner as *prima facie* correct, and cast upon him the burden of disproving it. This is the well-settled rule, and it was not error for the board to apply it in this case.

The same court in *Brown v. Commissioner of Internal Revenue*, 22 F. (2d) 797, 798, reiterated the rule as follows :

On the appeal to the board the findings of the Commissioner as to the amounts allowable as deductions and the subsequent determination of the deficiency of taxes were to be taken as *prima facie* correct. The burden was on the taxpayer to overcome this presumption by competent evidence.

See also, *W. K. Henderson Iron Works & Supply Co. v. Blair* (Ct. App. D. C.), 25 F. (2d) 538, 539; *Bishoff v. Commissioner of Internal Revenue*

(C. C. A. 3rd), 27 F. (2d) 91; *Rieck v. Heiner* (C. C. A. 3rd), 25 F. (2d) 453, 454; *Green's Advertising Agency v. Blair* (C. C. A. 9th), 31 F. (2d) 96, 98.

Rule 30 of the Rules of the Board of Tax Appeals is as follows:

Burden of proof.—The burden of proof shall be upon the petitioner, except that in respect of any new matter of fact pleaded in his answer, it shall be upon the respondent.

This rule was promulgated pursuant to the general authority to make rules of practice conferred upon the Board by Section 907 (a) of the Revenue Act of 1924 as amended and reenacted in Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9, which provides, in part, as follows:

The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.

Rule 30, promulgated under the Revenue Act of 1926, continued without substantial change Rule 20 of the Rules of Practice of the Board promulgated under the Revenue Act of 1924, which was:

Upon hearing of appeals the taxpayer shall open and close and the burden of proof shall be upon him.

The Revenue Act of 1926 did not change the rule which the Board had adopted and followed

under the Revenue Act of 1924. When the 1926 Act was reported as a bill to the Senate, the Committee Report stated (Senate Report No. 52, 69th Congress, 1st Session, page 36) :

The bill does not propose any change in the burden of proof as it now rests in proceedings before the Board.

The rule, adopted and followed by the Board under both acts, is reasonable. It recognizes as *prima facie* correct the determination of the administrative officer who, under the internal revenue laws, is charged with the duty of determining and assessing the taxes imposed by such laws, and requires a taxpayer appealing from such determination to prove the truth or correctness of the matter for which he is contending. The rule states what has at all times been the rule as to the effect of a determination by a Commissioner of Internal Revenue in relation to matters arising under the internal revenue laws. Whether in a suit by a taxpayer to recover taxes illegally collected or in a suit by the United States to recover taxes due, the determination of a Commissioner of Internal Revenue has always been treated as being *prima facie* correct as to the matters embraced within his determination.

Appellant has attempted, however, to distinguish between a proceeding before the Board of Tax Appeals where no formal assessment has been made and a proceeding in court to recover a tax and to

enforce the collection thereof where an assessment has been made. (Brief, p. 51.) But when the reason for the creation of the Board of Tax Appeals is considered, the basis for the attempted distinction falls away. The Supreme Court, in the case of *Old Colony Trust Company v. Commissioner of Internal Revenue*, 279 U. S. 716, 721, has briefly stated such reason:

The Board of Tax Appeals, established by Section 200 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment.

To hold that the mere change in the form of procedure, which was designed to relieve taxpayers from the burdensome necessity of first paying taxes assessed and then suing to recover such, has had the effect of shifting the burden of proof, would be to do violence to the intent and purpose of the Congress and to the well-established rule that the determinations of the Commissioner of Internal Revenue are *prima facie* correct. The fundamental nature of the proceedings under Section 900 of the

Revenue Act of 1924 as amended by Section 100 of the Revenue Act of 1926, remains the same as it was before the passage of the Revenue Act of 1924. Still the Commissioner is proceeding to collect taxes due. Since June 2, 1924, assessment has not been necessary (unless the tax may be in jeopardy) where a notice of deficiency has been sent to a taxpayer and appeal has been filed with the Board of Tax Appeals, for the statute of limitations upon assessment is suspended during the pendency of such appeals. Section 277 (b) (2), Revenue Act of 1924; Section 274 (a), and Section 278 (a) of the Revenue Act of 1926.

For practical purposes at least the determination of the Commissioner upon which is based the proceeding before the Board is the equivalent of formal assessment. To assess is to settle, to determine or fix the amount to be paid. *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828, 831. The word "assess" is defined in *Bouviers Law Dictionary, Library Edition*, at page 90, as follows:

To rate or fix the proportion which every person has to pay of any particular tax.
To tax. * * * To fix the value of; to fix the amount of.

See also *Stange v. United States* (Ct. Cls.), decided Nov. 4, 1929, not yet reported. (P. H. F. T. S., 1929, Vol. 1, p. 1587.)

The rule works no undue hardship upon appellant. The right of Congress to raise presumptions,

even in criminal cases, which have the effect of shifting the burden of proof has been sustained. In *Yee Hem v. United States*, 268 U. S. 178, the Supreme Court held valid the Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Act of January 17, 1914, c. 9, 38 Stat. 275. Section 2 of this Act provided that possession of opium "shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." Section 3 provided that after a certain date all smoking opium shall be presumed to have been imported subsequent to another date "and the burden of proof shall be on the claimant or the accused to rebut such presumption." If the burden may be placed upon the accused in a criminal case such as the above, certainly it must follow that it may be placed upon the taxpayer in such a case as the instant one.

Appellant asserts that the Commissioner in this case has not set forth the grounds for his determination of the deficiency in tax (Brief, p. 48), but this is not an accurate statement.

The "Statement" attached to and forming a part of the notice of deficiency sets forth that (R. 14):

You are advised that after a thorough review of your case the Bureau holds that no exceptional hardship evidenced by a gross disproportion between the tax computed without the benefit of Section 327 and the

tax computed with reference to representative corporations specified under Section 328 owing to abnormal conditions affecting your capital or income, has been disclosed.

The petition filed by petitioner with the Board of Tax Appeals states (R. 10) :

4. The determination of tax contained in said deficiency letter is based upon the following errors:

(a) That taxpayer's application for assessments under Sections 327 and 328 of the Revenue Act of 1918 was denied.

(b) The Commissioner erred in reducing taxpayer's invested capital by taxpayer's Federal income and excess profits taxes for 1917 prorated.

(c) The time within which the alleged deficiency may be assessed has elapsed.

and thereafter proceeds to set forth the facts upon which appellant relied as a basis of its appeal. (R. 10-11.) If the appellant had offered satisfactory evidence of these facts the *prima facie* case of the appellee would in all probability have been overcome. In any event, appellant was apprised of the basis for the Commissioner's determination. It introduced no evidence whatever before the Board to disprove the correctness of the Commissioner's determination and the Board therefore properly affirmed the deficiency asserted.

II

The time within which assessment and collection of the deficiency asserted may be made has not elapsed

Appellant's return for the year 1918 was filed on June 15, 1919. Under date of February 8, 1924, appellant and appellee entered into a written consent extending the time prescribed by law for assessment and collection of appellant's income and excess-profits taxes due under its return for 1918. This waiver remained in effect "for a period of one year after the expiration of the statutory period of limitation * * *." (R. 16.)

Section 250 (d) of the Revenue Act of 1921 which was in force when this consent was entered into provided in substance that the amount of income and excess-profits taxes due under the Revenue Act of 1918 should be assessed within five years from the date of the filing of a return. Had there been no waiver filed obviously the time within which assessment might have been made would have expired on June 15, 1924. The waiver of February 8, 1924, extended the time for assessment one year or until June 15, 1925.

On June 2, 1924, while the waiver of February 8, 1924, was still in force and before the expiration of the statutory period of limitations (unextended by such waiver) had expired, the Revenue Act of 1924 became effective. This Act continued in force the five-year period of limitation for the assessment

of taxes due under the Revenue Act of 1918. Section 277 (a) (2).

At this point there was no change in respect of the statutory period as extended. Still the Commissioner might have assessed prior to June 15, 1925.

The Congress in the Revenue Act of 1924 provided for the creation of the Board of Tax Appeals. (Section 900, Revenue Act of 1924.) This Act also provided, Section 274 (a), that:

If, in the case of any taxpayer, the Commissioner determines that there is a deficiency * * * the taxpayer, * * * shall be notified of such deficiency * * *, but such deficiency shall be assessed only as hereinafter provided. * * *

Section 277 (b) provided as follows:

The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

Under date of April 20, 1925; that is, before the expiration of the statutory period of limitations as extended by the waiver of February 8, 1924, and in

accordance with Section 278 (c) of the Revenue Act of 1924, and in accordance with Section 277 (b) of such Act, appellant and appellee entered into a second consent to the extension of the period of limitations as extended by the first waiver. (Respondent's Exhibit "B," R. 27.)

This waiver purported to and did waive the time prescribed *by the Revenue Act of 1924* for making assessment of the amount of income and excess-profits taxes due for the year 1918.

It was to remain in effect until December 31, 1925, except that in the event that a notice of deficiency was mailed under the provision of Section 274 (a) of the 1924 Act and in the event that an appeal was filed with the Board of Tax Appeals, as provided for by that section of the Act and by Section 900, then it was to remain in effect until December 31, 1925, plus the number of days between the date of mailing of the notice of deficiency; that is, November 27, 1925 (R. 3, 6, 17), and the date of the final decision of the Board. The date of the expiration can not be definitely stated, for the decision of the Board has not yet become final. Section 1005 (a) (1) and (2), Revenue Act of 1926.

As no notice of deficiency had been mailed to appellant it became necessary to secure before December 31, 1925, another waiver. Under date of October 23, 1925, appellant and appellee entered into a third consent. (R. 17, Appellee's Exhibit "C," R. 28.) This waiver, as was its predecessor,

was given while the Revenue Act of 1924 was in effect. It purported to and did waive the time prescribed by the Revenue Act of 1924 for making assessments of the amount of taxes due for the year 1918. It was to remain in effect until December 31, 1926, with the same exceptions as applied in the case of the second waiver—that is, that of April 20, 1925.

Shortly after this last waiver was given by appellant and on November 27, 1925, a notice of deficiency was mailed to appellant in accordance with the provisions of the Revenue Act of 1924. (R. 3, 6, 17.) Within sixty days as provided by Section 274 (a) of the Revenue Act of 1924, or on January 25, 1926 (R. 3), appellant filed a petition with the Board of Tax Appeals.

The Revenue Act of 1926 became effective February 26, 1926. Section 277 (a) (3) of that Act provided in substance in part that the amount of income and excess-profits taxes imposed by the Revenue Act of 1918 should be assessed within the five-year period after the return was filed.

It will at once be seen from what has been said, that the statutory period for assessment and collection of taxes due from appellant for the year 1918 has not expired. Restated, the fact is that while the Revenue Act of 1921 was in force the appellant waived the five-year period of limitation. Prior to the expiration of the five-year period (unextended) the Revenue Act of 1924 became law. It fixed a five-year period for assessment and col-

lection of 1918 taxes. Before the expiration of the five-year period as extended by the first waiver, that is, before June 15, 1925, a second waiver was given. Before the second waiver expired a third consent was entered into. Before this expired a notice of deficiency was mailed. The Board's decision has not yet become final. It will not have become final until at least three months after the decision of this court. Section 1005, Revenue Act of 1926. *L. Loewy and Son, Inc. v. Commissioner* (C. C. A. 2d), 31 F. (2d) 652. Assessment may therefore hereafter be made and collection effected at least within six years from the date of such assessment. See Section 278 (d), Revenue Act of 1924. *Loewer Realty Co. v. Anderson* (C. C. A. 2d), 31 F. (2d) 268; *L. Loewy and Son, Inc. v. Commissioner, supra*; *Florsheim Brothers Dry Goods Co. v. United States* (C. C. A. 5th), 29 F. (2d) 895; *Aiken v. Commissioner of Internal Revenue* (C. C. A. 8th), decided October 25, 1929, not yet reported.

Notwithstanding the unbroken chain of waivers, appellant advances several contentions calculated to convince this court that assessment of the tax due is barred. These contentions will be briefly discussed.

Appellant contends that as the Commissioner did not mail a notice of deficiency to it after the passage of the 1926 Act, no assessment may now be made, asserting that the following language, which is part of Section 274 (a) of the 1926 Act, is controlling:

* * * no assessment of a deficiency in respect of the tax imposed by this title * * * shall be made * * * until such notice has been mailed to the taxpayer.

While Section 283 (a) of the Revenue Act of 1926 provides that if after the enactment thereof the appellee determines that an assessment should be made in respect to the Revenue Acts of 1916, 1917, 1918, 1921, and 1924, he is authorized to mail a notice of the amount proposed to be assessed, there is no mandatory provision that the appellee should mail such a notice where the determination has been made and notice has already been mailed prior to the enactment of the 1926 Act. The fact that Section 283 (b) of that Act specifically gives the Board jurisdiction of an appeal filed from such a notice and pending before the Board at the time of the enactment of that Act refutes the appellant's contention. (R. 18.)

Appellant relies on the case of *Toxaway Mills v. United States*, 61 Ct. Cls. 363, reversed on confession of error by the Solicitor General, 273 U. S. 781, 63 Ct. Cls. 646. That case can not be construed as authority for appellant's contentions. The Court of Claims held that where the plaintiff filed its return for 1917 (under the Revenue Act of 1916) on April 1, 1918, and on February 10, 1928, waived all statutory limitations as to the time for assessment of the tax, assessment of the tax on October 27, 1923, and its collection on November 8, 1923, were not barred by the five-year limitation of Sec-

tion 250 (d) of the Revenue Act of 1921. When the case reached the Supreme Court two questions were involved. The principal question was whether the limitations prescribed by Section 250 (d) of the Revenue Act of 1921 applied to distraint proceedings as well as judicial proceedings. This question was decided against the United States in *Bowers v. N. Y. & Albany Co.*, 273 U. S. 346, while the *Toxaway Mills case* was pending in the Supreme Court. The only other question in the case was whether the particular document constituting the waiver which waived "all statutory limitations as to the time in which assessments" might be made operated not only to waive the limitation on assessments but also to waive a limitation respecting the time in which distraint or suit might be resorted to where the latter limitation was created subsequent to the date of the waiver. The major question having already been decided against the United States, the Solicitor General concluded to confess error and have the case remanded to the Court of Claims.

The Board of Tax Appeals correctly held that the instant case does not fall within the doctrine laid down in the *Toxaway Mills case*. The two cases are readily distinguishable. In the *Toxaway Mills case* the taxes were imposed by the Revenue Act of 1916. That Act provided a three-year limitation for the assessment of taxes and no limitation for collection. Section 250 (d) of the Revenue Act of 1921, enacted November 23, 1921, provided a five-

year limitation for collection from the date of the return. The waiver by its terms extended the time for *assessments* only and there seems no real basis for the holding of the Court of Claims that such a waiver could operate to waive the statutory period for collection of taxes subsequently enacted.

It is true that this court, in the case of *Joy Floral Co., v. Commissioner*, 29 F. (2d) 865, held that a waiver given after the bar of the statute of limitations had fallen did not effectively suspend the running of the statute of limitations. The facts in that case, however, are not parallel to the facts in this, in that the statute of limitations had actually expired when the waiver there was given, both parties acted under the mistaken belief that the period had not expired, and the taxpayer was misled by the representations of the Commissioner. Compare, *Stange v. United States* (Ct. Cls.), decided November 4, 1929, not yet reported.

The case of *Russell v. United States*, 278 U. S. 181, cited by appellant (Brief, p. 58), stands merely for the proposition that where assessment of a tax was made prior to June 2, 1924 (the date of the passage of the Revenue Act of 1924), Section 278 of the 1924 Act has not the effect of extending the time for collection for six years from the date of such assessment.

At the risk of extending this brief beyond reasonable limits, appellee proposes to spell out the situation in respect of the limitations issue by ref-

erence to the pertinent provisions of the several acts affecting the question rather than to attempt to counter directly the confusing contentions of appellant.

Section 250 (d) of the Revenue Act of 1918 provided a five-year period of limitations for the assessment and collection of taxes due under that Act. Section 250 (d) of the Revenue Act of 1921 also provided a five-year period of limitations for assessment and collection of taxes due under the Revenue Act of 1918. Section 280 of the Revenue Act of 1924 provided that if after the enactment of such Act the Commissioner of Internal Revenue determined that an assessment should be made in respect of income or excess-profits taxes imposed by the Revenue Act of 1918, or by that Act as amended, the amount which should be assessed should be computed as if the Revenue Act of 1924 had not been enacted but that the amount so computed should be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of taxes imposed by Title II of the Revenue Act of 1924. Now Section 274 of the Revenue Act of 1924 provided that if the Commissioner determined that there was a deficiency in respect of the tax imposed by Title II, the taxpayer should be notified of such deficiency but that such deficiency should be assessed only as otherwise provided in the Act. This section also provided that within sixty days after the mailing of such notification, a tax-

payer might file an appeal with the Board of Tax Appeals established by Section 900 of the Act. Appellant appealed to the Board of Tax Appeals under Sections 280 and 274 (a) of the Revenue Act of 1924.

Section 277 (a) (2) of the 1924 Act provided a five-year period of limitations for assessment of taxes due under the Revenue Act of 1918 except where both the Commissioner and the taxpayer consented in writing to the assessment of the tax after the time prescribed by Section 277 (278 (c) of the Revenue Act of 1924). Section 278 (c) provided that in the event that the Commissioner and the taxpayer consented to a later assessment of the tax then such tax might be assessed at any time prior to the expiration of the period agreed upon.

The running of the statute of limitations upon assessment was suspended by Section 277 (b) of the Revenue Act of 1924 which provided in substance that the period within which an assessment is required to be made by subdivision (a) of this Section in respect of any deficiency, shall be extended by sixty days after a notice of deficiency has been mailed to the taxpayer under subdivision (a) of Section 274 and no appeal has been filed with the Board of Tax Appeals, or if an appeal has been filed then by the number of days between the date of the mailing of such notice and the date of final decision by the Board. Where assessment of a tax for 1918 has been made or will be made after the date of the passage of the Revenue Act of 1924,

that is, on June 2, 1924, Section 278 (d) permits collection within six years from the date of such assessment. An appeal having been filed with the Board of Tax Appeals and the decision of the Board not yet having become final and the statute of limitations being in suspense (Section 277 (b) of the Revenue Act of 1924) at the date of the passage of the Revenue Act of 1926 (February 26, 1926), Section 278 (e) of the Revenue Act of 1926 has no applicability to the facts of the case at bar.

Section 283 (b) of the Revenue Act of 1926 gave the Board of Tax Appeals jurisdiction of this appeal in that it provided in substance that if before the enactment of the Revenue Act of 1926 any person had appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 and the appeal was pending before the Board at the time of the enactment of the 1926 Act, the Board should have jurisdiction of the appeal. This section provided that in all such cases the powers, duties, rights, and privileges of the Commissioner, and of the person who has brought the appeal, and the jurisdiction of the Board, and of the courts should be determined and computation of the tax should be made in the same manner as provided in subdivision (a) of Section 283.

Section 283 (a) provided that if after the enactment of the Revenue Act of 1926 the Commissioner determined that any assessment should be made in respect of any income or excess-profits taxes im-

posed by the Revenue Act of 1918 or by that Act as amended, the Commissioner was authorized to send to the person liable for such tax notice of the amount proposed to be assessed and further provided that such notice should be for the purpose of the 1926 Act considered a notice under Section 274 (a) of the Act. This section also provided that in a case of any such determination made after the effective date of the 1926 Act, the amount which should be assessed should be computed as if the 1926 Act had not been enacted, but the amount so computed should be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by Title II of the Revenue Act of 1926.

Section 274 (a) of the 1926 Act provided that after the Commissioner's determination that there existed a deficiency in respect of taxes imposed by the Revenue Act of 1918, the Commissioner was authorized to send notice of such deficiency to the taxpayer who might within a specified time appeal to the Board of Tax Appeals. This section also provided that assessment should be suspended until such notice had been mailed, and in the event that an appeal is filed with the Board of Tax Appeals until the decision of the Board had become final. Section 1005 of the Revenue Act of 1926 provided that the decision of the Board of Tax Appeals would become final not sooner than three months after the

decision of this court. This provision, taken in connection with Section 277 (b), would permit assessment to be made at least until the date of this court's decision plus three months, plus the number of days intervening between the mailing of the notice of deficiency on November 27, 1925, and the final decision of the Board of Tax Appeals.

Section 277 (a) (3) of the Revenue Act of 1926 provided a five-year period of limitations upon the assessment and collection of taxes due under the Revenue Act of 1918, while Section 278 (c) provided that where both the Commissioner and the taxpayer have consented in writing to the assessment of a tax after the time prescribed in Section 277, such may be assessed at any time prior to the expiration of the period agreed upon. After such assessment has been made the appellee may within six years from the date thereof collect such tax under the provisions of Section 278 (d), which provides that where an assessment of income and excess-profits taxes for the year 1918 has been made either before or after the enactment of the Revenue Act of 1926 within the statutory period of limitations as extended in accordance with Section 278 (c) collection may be affected within six years from the date of such assessment.

The foregoing explanation is necessarily complex. A study of the several provisions will reveal to this court that the arguments advanced by appellant are based upon erroneous assumptions and constructions and are untenable.

CONCLUSION

It is respectfully submitted that the Board properly affirmed the deficiency asserted by the Commissioner and correctly held that the time for the assessment of that deficiency has not elapsed.

Respectfully,

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NOVEMBER, 1929.

APPENDIX

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, are as follows:

SEC. 250. * * * (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

The pertinent provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, are as follows:

SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes * * * due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun after the expiration of five years after the date when such return was filed, * * *.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat. 253, are as follows:

SEC. 277. (a) * * * (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. * * * (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest,

penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

SEC. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

The pertinent provisions of the Revenue Act of 1926, c. 27, 44 Stat. 9, are as follows:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if

a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

SEC. 278. * * * (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as

provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

(b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

SEC. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

“TITLE IX.—BOARD OF TAX APPEALS

* * * * *

“ORGANIZATION AND PROCEDURE

* * * * *

“SEC. 907. (a) * * * The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. * * *.”

SEC. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; * * *.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

JAN 28 1930

Court of Appeals *Harry M. Hodges*
CLERK.

OF THE DISTRICT OF COLUMBIA.

NEIMAN-MARCUS COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

4914
No. ~~4904~~

REPLY BRIEF FOR PETITIONER.

I.

The evidence before the Board was insufficient to justify the finding of a deficiency by the Board.

Petitioner has carefully considered the arguments presented and authorities cited by respondent, and finds that, although in its opinion the authorities cited do not sustain respondent's contentions or justify the practice of the Board, the question is a more fundamental one than that of burden of proof, and requires more careful analysis than it has received, either in the briefs heretofore filed in the instant case, or in the decisions of the courts in the somewhat analogous cases cited.

The question is not one of "burden of proof," but of the entire structure, function and procedure of the Board of Tax Appeals.

Immediately after the creation of the Board of Tax Appeals by the Revenue Act of 1924, enacted on June 2, 1924, the newly-appointed members thereof proceeded, as their first important official act, pursuant to the statute, to formulate a set of rules, including rules covering the forms of pleading and the manner of bringing cases before the Board and of prosecuting them.

They decided to organize the Board on the model of an appellate court, and prescribed a form for "petitions," which taxpayers must use in order to exercise their right of appeal. They admittedly had a difficult statute to deal with. In order to appeal a case from a lower tribunal it is necessary to have assignment of errors. But assignment of errors presupposes a record of proceedings to which such assignments relate, so that they can be traced and the correctness of the decision of the lower tribunal passed upon. The Commissioner of Internal Revenue kept no record of proceedings before him which could be used on appeal. Consequently, the method of assignment of errors was inappropriate, because there was no record of the errors.

It was realized at an early stage that the Board of Tax Appeals was not in fact an appellate body, in an accurate sense of the term, but that it was really a tribunal of first instance. This was made clear by the Board itself in decisions quoted in petitioner's opening brief, viz.: *Appeal of E. J. Barry*, 1 B. T. A. 156, and *Appeal of Gutterman-Strauss Co.*, 1 B. T. A. 243. The logic of these decisions

is unassailable. The Board can decide cases only by taking evidence, and is therefore a tribunal of first instance.

The Board of Tax Appeals, however, prescribed a form of petition which required an assignment of errors. The rule also requires a statement of the facts upon which the petitioner relies. Thus a burden is put upon the taxpayer which it is impossible for him to sustain. He is required to assign errors when there is nothing before the Board to refer to, and he is required to state the facts upon which he relies, as if he were the moving party, although he is really in a defensive position and there is nothing before the Board to show upon what facts the Commissioner, who is actually the moving party, relies. In other words, he is required to construct a record out of his memory, in order to form a basis of reference for his assignment of errors, and he is forced to state the Commissioner's facts in order to refute them.

Up to this point there is no question of evidence involved. The question, so far, is, How is the case to be brought to issue? By the ingenious device of "presumption of correctness" of the Commissioner's determination, the taxpayer is forced to make the issue entirely by his own pleading, except as to his affirmative defenses, which alone the Commissioner deigns to answer.

How would this situation be met in analogous cases in court? There the law is well settled that if the Government sues a taxpayer on an assessment, it need only allege and prove the assessment and its non-payment. Both petitioner's and respondent's briefs are crowded with citations establishing this rule. Thus the burden thrown on the

taxpayer by proof of an unpaid assessment is substantially the same as that contemplated by the Commissioner and the Board in Board of Tax Appeals cases, and is often practically impossible to be sustained. *But it was this very injustice which the Board of Tax Appeals was created to correct.* A hearing before the Board and a redetermination of the tax by the Board after such hearing and before assessment was designed to give assessments that quasi-judgment quality which justified its being treated as a *prima facie* showing that the amount assessed was correct.

The courts have held, as shown in petitioner's opening brief, that when the Government sues a taxpayer without an assessment, the burden is on it to establish a case (*Little Miami & C. & N. R. Co. v. United States*, 108 U. S. 277; *United States v. Guggenheim Exploration Co.* (D. C.), 238 Fed. 231). In such a case there is no presumption that the determination of the Commissioner is correct. A case in the Board of Tax Appeals is more nearly analogous to a suit in court to collect a tax which has not been assessed than to any other form of action or proceeding. In each there is no assessment; the amount of tax due is to be determined on the evidence; the Commissioner has determined the amount due and the Government is claiming that amount and seeking the sanction of the Court.

Why should there be a presumption of correctness of the Commissioner's determination in the one case and not in the other? Why should the Commissioner's determination have such weight in the Board when it has no weight at all in a court under similar circumstances?

When a taxpayer is suing to recover a refund, the situation is different. He is the moving party,

and properly has the burden of establishing that he paid more tax than the law required. Formerly the taxpayer's only remedy was to pay the tax claimed and then sue to recover it. The purpose of the creation of the Board of Tax Appeals was to relieve the taxpayer of this hardship by providing for a final adjudication of his tax liability before he is called upon to pay it. In the Report of the Senate Committee on Finance, on the Revenue Bill of 1924, dated April 10, 1924, at page 8, occurs the following explanation of the provisions creating the Board of Tax Appeals:

“The bill provides for the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although under the existing law a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination on the questions involved, he cannot, in view of Section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this

payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

Under the existing law a taxpayer prior to the payment of his tax may appeal to the commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him. The objections that have been raised to this procedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that such an appeal does not involve a review by an impartial outside body, such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide the appeal acts both as advocate and judge, since he must both protect the interests of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer, the action of the bureau is final and the correctness of the decision can never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on this appeal, an expensive and burdensome procedure.

Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals and secure an impar-

tial and disinterested determination of the issues involved. In the consideration of the appeal both the Government and the taxpayer will appear before the board to present their cases, with the result that each member of the board will sit solely as judge and not as both judge and advocate. The provision allowing the commissioner to sue in court for the recovery of any taxes thought by him to be due in excess of that decided by the board to be due relieves the board from the responsibility of finally passing upon questions involving large amounts and removes the necessity for a decision in favor of the Government in order to force the issues into court. The divisions of the board will sit locally throughout the United States to enable taxpayers to argue their cases with as little inconvenience and expense as is practicable. This proposal meets all the objections that have been raised as to the existing system and at the same time provides for a flexible and informal procedure which will permit the board to determine expeditiously the cases brought before it on appeal."

Since, at the time of hearing before the Board of Tax Appeals, the deficiency has not been assessed or paid, the status of the Commissioner as moving party has not been changed. He is still the claimant, as he would be in a suit in court to collect the tax. He is still asserting deficiency, which the taxpayer contests. This is recognized by the Supreme Court in *Old Colony Trust Co. v. Commissioner*, 49 S. Ct. 499, 502, where, considering on certiorari a case which had been appealed from the Board of

Tax Appeals to a Circuit Court of Appeals, the Court said:

“In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the government, and the taxpayer is resisting that payment * * *.”

It is hard to conceive any sound reason why a taxpayer would be placing himself on the offensive by the act of resisting a claim for taxes in the Board of Tax Appeals, although he would remain on the defensive if that claim were made in court.

The logical procedure before the Board, in order to conform to the existing law and carry out the intention of Congress in creating the Board, would be to require the Commissioner to allege and prove his claim of a deficiency, and to require the taxpayer to allege and prove only his affirmative defenses. The taxpayer should be advised of the Commissioner's claim and the basis for it before being required to file any pleading. In this way only can he plead his case intelligently. But this is impossible under the system and form of pleading prescribed by the Board. The taxpayer is unable to deny the allegations of the Commissioner's claim, and thus put them in issue, for the reason that there are no allegations.

All the authorities cited by respondent are distinguishable, either because they were refund cases, or cases where assessments had been made, or cases where the question was the weight of evidence and not the burden of proof. It is realized that a court will not reverse a case where the evidence supports

the findings, no matter which side had the burden of proof. None of the decisions cited by respondent is in point, although the language in some of them, *obiter dicta*, is favorable to his theory. The fact is that the courts have discussed the term "burden of proof" loosely, when their decisions, as shown by a study of the cases, rested on other grounds, such as the weight of evidence, or the fact that there was sufficient evidence to support the findings, neither of which is present in the instant case.

The decision of the Board of Tax Appeals should be reversed because there is no evidence to support its findings, because respondent has neither alleged nor proved his claim of a deficiency, and because the Board has made no effort whatever to perform its statutory duty of determining the correct tax.

II.

The time within which an assessment of the proposed deficiency can be made has elapsed, and the decision should be that there is no deficiency.

Respondent contends (p. 20) that there is no *mandatory* provision that the Commissioner of Internal Revenue should mail a notice *after* the enactment of the Revenue Act of 1926, where the determination of the deficiency has been made and a notice has already been mailed *prior* to the enactment of that Act. With that contention appellant takes issue.

Although respondent had determined a deficiency prior to the enactment of the Revenue Act of 1926,

it was necessary for him to make a new determination after such enactment, for the reason that the new Act contained new provisions, some of them retroactive, which might affect the computation. Even though the Commissioner stands by the amount previously determined, his action in so doing is evidence of a new determination, viz., a determination that none of the provisions of the new Act affects the computation previously arrived at. It is not to be considered that the Commissioner would stand by his determination under another Act if Sections 1207, 1208, 1209, 1210, 1116, 1108(a) or 283(d) of the Revenue Act of 1926, or any other section of that Act, were applicable and changed the amount of the tax as computed under the former Act. Under these conditions it is mandatory that the Commissioner send a new notice, even though the deficiency previously claimed is pending before the Board of Tax Appeals.

Under the provisions of subdivision (b) of Section 283 of the 1926 Act, the Board retains jurisdiction of an appeal filed before the enactment of that Act, but only subject to the provisions and limitations contained in subdivision (a) of the same section. Subdivision (a) provides for the assessment and collection of a deficiency for a prior year *only* "as in the case of a deficiency in the tax imposed by this title." It is obvious that a deficiency in the tax imposed by "this title," that is, by the Revenue Act of 1926, could not be assessed by virtue of a notice mailed prior to the enactment of that Act. It would be a physical impossibility. Hence, subdivision (a) of Section 283 must be considered to contemplate only notices of deficiency mailed after the enactment of the Revenue Act of 1926.

This argument is supported by the fact that Section 277(b) of the 1926 Act provides for a suspension of the running of the statute of limitations *only where the deficiency notice was mailed AFTER the enactment of the 1926 Act*. In other words, there is no suspension of the statute of limitations, unless a new deficiency letter is mailed. Counsel for respondent failed to answer this point, and appellant believes it unanswerable because the statute is so clear and unambiguous as to leave no room for construction or interpretation.

Section 277(b) of the former (1924) Act also provided for a suspension of the statute of limitations where a deficiency notice was mailed while the 1924 Act was in effect. Counsel for respondent has emphasized this fact and placed great reliance upon it, as did the Board in the decision appealed from in this proceeding. This provision was, however, *repealed* by the Revenue Act of 1926. This was demonstrated on page 64 of appellant's opening brief, but the argument is briefly repeated here, for convenience, as follows:

Section 1200 of the Revenue Act of 1926 specifically repealed "Sections 271 to 282, inclusive," of the 1924 Act, as of the date of enactment of the repealing provision. Hence, it repealed Section 277 of the 1924 Act, being one of the sections covered by the word "inclusive." Subdivision (b) of said Section 1200 (the repealing section) kept those sections in force for the collection of tax, "except as provided in Sections 283 and 318 and except as otherwise specifically provided in this Act." (This Section 318 mentioned refers to estate taxes.) Section 283 provides, as above stated, that such tax shall be assessed and collected "in the same man-

ner, and subject to the same provisions and limitations * * * as in the case of a deficiency in the tax imposed by this title," i. e., the 1926 Act.

Since Section 277(b) of the 1924 Act was repealed, as above shown, by the 1926 Act, the period of suspension was vacated, and the limitation period provided in Section 277(a) of the 1926 Act controlled, that is, five years from the time the return was filed, or five years from June 15, 1919. But even if the suspension period of the 1924 Act was revived by Section 283(1) of the 1926 Act, there has been no suspension since the 1926 Act was enacted. Section 283(1) does not purport to continue the suspension after the enactment of the 1926 Act—that being the function of 277(b), which was never called into operation by the mailing of a deficiency notice after the enactment of the 1926 Act. Consequently, the period of limitation has expired, in any event, so far as the suspension provisions of the 1924 and 1925 Acts are concerned.

It may be said that this theory, if correct, would extinguish the authority of the Commissioner to assess any additional tax for years earlier than 1921, and would invalidate many assessments and collections which have been made, although Congress obviously intended by the language of Section 283(a) of the 1926 Act to authorize the assessment of deficiencies for years as early as 1916, hence considered that the statute had not expired as to such assessments.

The answer to this argument is that we must follow the mandate of the statute to whatever result it leads, even if that result seems inconsistent with our preconceptions. It is only where a statute is ambiguous, or where its meaning is not clear, that such considerations can influence our thought.

Certainly, Congress did not intend by Section 283(a) of the 1926 Act to revive deficiencies on which the period of limitation for assessment had previously expired. It provided specifically in another place that the Board should determine that there was no deficiency in any case where assessment or collection was barred by limitation of time (Sec. 906(e), Revenue Act of 1924, as amended by Sec. 1000, Revenue Act of 1926). So it was not the function of Section 283(a) to revive barred deficiencies.

There were undoubtedly many cases as to which the limitation period had not expired at the enactment of the 1926 Act, and to which Section 283(a) would be applicable; for example, all cases of false and fraudulent returns; all cases where no return was filed; all cases where a tentative deduction for amortization of war facilities was allowed (see Sec. 278 of the 1926 Act). Section 283(a) was not without a subject to which to apply.

From the above the following conclusions must be drawn:

(1) No deficiency could legally be determined in this case after the enactment of the Revenue Act of 1926 in the absence of a deficiency notice mailed after that enactment.

(2) There was no suspension of the limitation of time for assessing a deficiency after the enactment of the Revenue Act of 1926, since no deficiency notice was mailed after such enactment.

(3) The Board had jurisdiction of the appeal under the provisions of subdivision (b) of

Section 283 of the 1926 Act, but only to hold that under the provisions of subdivision (a) there was no deficiency because the limitation period for assessment had expired.

The remaining question is the effect of the waivers in evidence. Appellant contends that when it filed a waiver under the 1921 Act it did not consent to assessment under the 1924 Act, not yet in existence, and that therefore the waiver was annulled upon the enactment of the 1924 Act, which substantially changed its rights; that when it filed further waivers while the 1924 Act was in effect the limitation period had already expired, and was not revived by such waivers; and that in any event appellant never consented to assessment under the 1926 Act, which again substantially changed its rights, and that it never filed any waiver or consent while the 1926 Act was in effect. On the contrary, it filed its appeal with the Board of Tax Appeals asserting the bar of the statute before the 1926 Act was enacted.

In the case of *Toraway Mills v. United States*, 61 Ct. Cl. 363, the Court of Claims said:

"We think that the plaintiff could waive a right given by statute. See *Shutte v. Thompson*, 15 Wall. 151, 159, and that it did so when it executed the waiver. But it does not follow that the waiver, standing alone, would be given the effect of waiving the provisions of a subsequent statute. The general rule is that a waiver extends to rights existing when it is made. See *Pence v. Langdon*, 99 U. S. 578, 581; *Bennecke v. Insurance Co.*, 105 U. S. 355, 359. In this view a consent authorized by the act of 1921 is one given after its enactment."

The Supreme Court reversed the Court of Claims without an opinion. Whatever the ground was for reversal, it was not that the above statement of law was incorrect, for that statement was favorable to the plaintiff, who won the judgment by reason of the reversal. The above-quoted statement by the Court of Claims has never been questioned by any court and is to-day the law of the land.

The Court of Claims held, however, that the parties might treat the waiver as continuing in effect after the enactment of the new Act. This exception to the doctrine above quoted is of doubtful legality, but even if correct, does not apply in this case. Appellant did not treat the waiver as continuing after the enactment of the 1926 Act.

The extension of the limitation period by waiver is contractual, and rests upon the taxpayer's consent. The taxpayer's rights are waived only to the extent that he consents that they be waived. It would be improper to construe an agreement in writing as authorizing something not contained in its terms. None of appellant's waivers authorized the assessment of a deficiency under the provisions of the Revenue Act of 1926, but only under the law existing at the time the waivers were executed.

In accordance with the doctrine stated by the Court of Claims in the *Toxaway Mills* case, a waiver is not authorized by the Revenue Act of 1926 unless given after its enactment.

Consequently it must be considered that the provisions for appeal to the Board of Tax Appeals, contained in the Revenue Act of 1926, with reference to deficiencies under earlier statutes, applied only in cases where the limitation of time had not already expired, or did not expire upon and by rea-

son of its enactment. In other words, these provisions applied only in cases where it was possible to mail a timely deficiency notice, after its enactment, without reliance on a waiver executed prior to its enactment. The mailing of a new deficiency letter was made mandatory. All suspension of the limitation provisions was annihilated unless and until such new deficiency letter was mailed. Only waivers executed after the enactment of the 1926 Act were authorized or recognized. In cases where these conditions did not or could not be complied with, the Board had jurisdiction only to hold that there was no deficiency.

It is submitted that these are the conclusions to be drawn from the statutes and the cases, that the decision of the Board should be reversed and that the judgment should be that there is no deficiency.

Respectfully submitted,

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